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federal register

BOOK 2 OF 2 BOOKS

MONDAY, MAY 16, 1977

PART VII

DEPARTMENT OF JUSTICE

Antitrust Division

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UNITED STATES v. NATIONAL BROADCASTING CO., INC.

Written Comments on Proposed Consent Judgment and Responses

DEPARTMENT OF JUSTICE

Antitrust Division

UNITED STATES v. NATIONAL BROADCASTING CO., INC.

Written Comments on Proposed Consent Judgment and Department of Justice Responses

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, the written comments on the proposed consent Judgment filed November 17, 1976, with the United States District Court in the Central District of California in Civil Action No. 74-3601-RJK, and the responses of the Department of Justice to such comments are published herewith. The Stipulation and Order modifying the proposed Final Judgment, and the modified proposed Final Judgment are also reproduced.

CHARLES F. B. MCALEER,
Assistant Chief, Judgments and Judgment Enforcement Section, Antitrust Division.

Bernard M. Hollander
Barry J. Kaplan
Bernard J. O'Reilly
George W. Selby
Kevin R. Sullivan
Polly L. Frenkel
Antitrust Division
Department of Justice
1444 U.S. Courthouse
Los Angeles, California 90012
Telephone: (213) 688-2500

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., Defendant.	)	Civil No. 74-3601-RJK STIPULATION AND ORDER

The parties having filed a Stipulation dated November 17, 1976, regarding the filing and entry of a Final Judgment in the form attached thereto, and comments having been received and considered by plaintiff, it is hereby stipulated and agreed by and between the parties, by their respective attorneys and subject to the approval of the Court, that:

1. The proposed Final Judgment lodged with the Court on November 17, 1976, shall be modified as follows:

(a) Section VI(E)(iii)(e) shall be deleted (page 9, line 31 - page 10, line 14).

(b) On page 11, line 5, "June 1" shall be substituted for "July 1."

The above modifications are incorporated in the amended proposed Final Judgment attached hereto.

2. Recognizing that the proposed Final Judgment does not specifically deal with the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, the parties have nevertheless agreed that the entry of this Final Judgment shall not preclude plaintiff, upon a showing that defendant has used such exclusive rights to impede competition in the television entertainment programming field or to circumvent any provision of the Final Judgment, from applying to the Court for relief under the Judgment against such conduct, provided that such relief would not place NBC at a competitive disadvantage with respect to CBS or ABC.

3. This Stipulation and Order, the above modifications, and the original inclusion and subsequent deletion of Section VI(E)(iii)(e) from the proposed Final Judgment, shall not estop plaintiff or defendant, or any person, in this or any other action or proceeding, from asserting any issue of fact or law as to the subject matter of Section VI(E)(iii)(e) or as to the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, nor shall they constitute any evidence or admission as to any such issue.

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Dated: May 4, 1977

FOR THE PLAINTIFF:

DONALD I. BAKER
Assistant Attorney General

WILLIAM E. SWOPE

CHARLES F. B. McALEER

BERNARD M. HOLLANDER

BARRY J. KAPLAN

BERNARD J. O'REILLY

GEORGE W. SELBY

KEVIN R. SULLIVAN

Attorneys, Department of Justice

FOR THE DEFENDANT:

SCHNADER, HARRISON, SEGAL & LEWIS

By: BERNARD G. SEGAL

JEROME J. SHESTACK

PETER S. GREENBERG

ORDER

IT IS SO ORDERED this _____ day of _____, 1977.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil Action No. 74-3601-RJK
NATIONAL BROADCASTING COMPANY, INC., Defendant.	)	

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on December 10, 1974, and defendant, National Broadcasting Company, Inc., having filed its answer herein on December 30, 1974, by their respective attorneys, each having consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding;

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NOW, THEREFORE, before any testimony has been taken, the Court being advised and having considered the matter, it is hereby:

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against defendant under the provisions of Sections 1 and 2 of the Act of Congress of July 2, 1890, 15 U.S.C. §§1, 2, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act.

II.

As used in this Final Judgment:

(A) "Person" means an individual, partnership, corporation or any other form of legal or business entity.

(B) "NBC" means the National Broadcasting Company, Inc. and its subsidiaries.

(C) A "person controlling NBC" means any person owning at least ten percent (10%) of, or a controlling share of, the outstanding voting stock of NBC.

(D) "NBC Television Network" means an NBC owned or operated business which provides television programs and related advertising messages to affiliated television broadcast stations.

(E) "Entertainment Program" means any program, including a feature film, exhibited or intended to be exhibited on

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television other than the following programs: news, public affairs, agricultural, religious, instructional, and sports (as those terms are defined in Appendix A to this Final Judgment). The inclusion of incidental or occasional entertainment or non-entertainment elements in a program or program series shall not be deemed to change the classification of the program or program series.

(F) "Independent Program Supplier" means a person who produces or offers one or more entertainment programs for network exhibition, other than NBC, a person controlling NBC, or a person in which NBC or a person controlling NBC has an ownership interest.

(G) "Network Exhibition" means the initial and repeat exhibitions of a television program on the NBC television network during the term of any agreement between NBC and an independent program supplier for such exhibition of such program.

(H) "Prime Time Hours" means the hours from 6:00 p.m. to 11:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 5:00 p.m. to 10:00 p.m. in the Central and Mountain Time Zones of the United States.

(I) "Daytime Hours" means the hours from 9:00 a.m. to 6:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 9:00 a.m. to 5:00 p.m. in the Central and Mountain Time Zones of the United States.

(J) "Fringe Hours" means the hours from 11:00 p.m. to 2:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Eastern and Pacific Time Zones of the United States, and the hours from

10:00 p.m. to 1:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Central and Mountain Time Zones of the United States.

(K) "Television Broadcast Station" means a station licensed as a television broadcast station by the Federal Communications Commission.

(L) "NBC Production Facilities" means studio facilities, including but not limited to, scenery, props and other production equipment, which are used for the production of entertainment programs exhibited or intended to be exhibited on television, and which are owned or leased by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

(M) "Stripping" means the broadcasting of more than one (1) episode per week of a television program series.

(N) "Broadcast Year" means the television broadcast year customarily commencing in September of one year and continuing until September of the following year.

III.

The provisions of this Final Judgment are applicable to NBC, to any person controlling NBC and to each of NBC's directors, officers, agents, employees, subsidiaries, successors, and assigns, and to all persons in active concert or participation with any of them, who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

NBC is enjoined and restrained from:

(A) Acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial

of any television program produced wholly or in part by an independent program supplier, other than the right to the Network Exhibition of the program except as provided in Sections VIII(A)-(D) of this Final Judgment, provided that an agreement granting NBC the right to Network Exhibition may include provisions concerning subject matters incident to the licensing and use of network programs, of which the following are examples: geographic scope and manner of transmission and delivery of network broadcasts; approval of creative elements and program content; technical quality and delivery requirements; union and Equal Employment Opportunity Act compliance; act of God, force majeure; preemptions; obligation to pay for, rather than plan, programs; number of episodes or programs ordered; assignability; warranties; indemnification; completion bonds; security agreements and financing statements; insurance; public morals; advertising conflicts; advertising, promotion and publicity of programs; audience testing and screening; cancellation; exclusivity for talent and creative personnel; exclusive exhibition rights (except as limited by Sections VI(E)(ii)-(iii) herein); pilots (except as limited by Section VI(F) herein); options (except as limited by Sections VI(E)(i), VI(F) and VI(G) herein); first negotiation and first refusal rights (except as limited by Sections VI(E)(i) and VI(G) herein); spinoffs (except as limited by Section VI(G) herein); repeats (except as limited by Section VI(H) herein); same day protection against once weekly syndication programs and theatrical feature films; title protection for the length of the applicable contract or contracts; format and continuing character protection; breach; and remedies, so long as any such provision does not violate the antitrust laws.

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(B) Selling, licensing, or distributing entertainment programs to television broadcast stations for non-network television exhibition (or otherwise engaging in the business commonly known as "syndication"), or to foreign television stations or networks, except as provided in Section VIII(D) of this Final Judgment.

V.

(A) NBC is enjoined and restrained for a period of ten (10) years from the effective date of this Section from offering for NBC network broadcast during Prime Time Hours, Daytime Hours or Fringe Hours, more than two and one-half (2-1/2) hours per week in Prime Time Hours, more than eight (8) hours per week in Daytime Hours, and more than eleven (11) hours per week in Fringe Hours, determined on the average per compliance period, of entertainment programs obtained from sources other than independent program suppliers, provided that during each compliance period NBC may add to the total number of allowable hours of entertainment programming from sources other than independent program suppliers, two (2) non-regularly scheduled special programs, and provided further that in any compliance period, NBC may, during Fringe Hours, increase the number of allowable hours of entertainment programming from sources other than independent program suppliers by reducing to the same extent the number

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of allowable hours of such programming in Prime Time Hours and/or Daytime Hours.

(B) For purposes of this Section V, compliance periods shall be consecutive semi-annual periods commencing at the start of each broadcast year. Compliance reports in the form set forth in Appendix B to this Final Judgment shall be submitted by NBC to plaintiff within thirty (30) days following the conclusion of each compliance period.

VI.

NBC is enjoined and restrained:

(A) From purchasing or offering to purchase from an independent program supplier the right to Network Exhibition of one or more entertainment programs upon the condition, express or implied, that NBC, or any person controlling NBC, will obtain any other right or interest from said supplier, except as to contractual provisions concerning subject matters incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(B) For a period of fifteen (15) years from the effective date of this Section, from purchasing or offering to purchase from an independent program supplier any right to the exhibition of a program, other than a live program, as an NBC television network entertainment program upon the condition, express or implied, that said supplier produce the program, in whole or in part, utilizing NBC production facilities.

(C) For a period of fifteen (15) years from the effective date of this Section from agreeing with an independent program supplier that said supplier use NBC production

facilities to produce a program, other than a live program, as an NBC television network entertainment program for a period in excess of the time required to produce episodes for one (1) broadcast year, provided that NBC and said supplier are not precluded each year from negotiating and contracting for additional periods not to exceed one (1) year each.

(D) For a period of ten (10) years from the effective date of this Section from purchasing or offering to purchase from CBS Inc. ("CBS") or American Broadcasting Companies, Inc. ("ABC") any right to Network Exhibition of any entertainment program upon the condition, express or implied, that CBS or ABC agrees to purchase or offers to purchase a right to network exhibition of any entertainment program produced or controlled by NBC.

(E) For a period of fifteen (15) years from the effective date of this Section from:

(i) Acquiring from an independent program supplier options for Network Exhibition of a prime time network entertainment program series exercisable for a period in excess of four (4) years from the date of first broadcast of an episode of such program as part of an NBC prime time television network entertainment program series, and the balance of any broadcast year in which such four (4) year period ends, provided that nothing herein shall prevent NBC, after the date of first broadcast, from negotiating new provisions which may include the purchase of an extension of the option period to five (5) years from the date of first

broadcast, and the balance of any broadcast year in which such five (5) year period ends, and, at the end or during the final year of any contract term, from negotiating for and entering into new agreements with said supplier so long as the options acquired under any such new agreements do not exceed a period of four (4) years from the date of first broadcast of an episode under such new agreements, and the balance of any broadcast year in which such four (4) year period ends, plus the right to negotiate for and acquire a fifth option year, and provided further that nothing herein shall prevent NBC from acquiring first negotiation and first refusal rights for new agreements with said supplier so long as any such first refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms, and provided further that nothing herein shall prevent NBC from entering into contractual provisions incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(ii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for prime time network entertainment program series episodes for which NBC has exercised a contractual right to Network Exhibition, in excess of the following:

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(a) for prime time use, the duration of any contract term or terms by which NBC acquires the right to Network Exhibition;

(b) for non-prime time stripping on television broadcast stations, four (4) years from the first prime time episode broadcast; and

(c) for all other broadcast uses, three (3) years from the first prime time episode broadcast,

provided that nothing herein shall prevent NBC from negotiating for and acquiring rights, including exclusive rights, for stripping and once weekly exhibition to be utilized after the periods of exclusivity set forth above, so long as negotiation for and acquisition of such rights takes place after NBC has agreed to order episodes of such program for the first year of broadcast as an NBC prime time television network entertainment program series, and provided further that nothing herein shall prevent NBC from acquiring exclusive exhibition rights to series episodes for the broadcast year for which such episodes are ordered.

(iii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for theatrical feature films for which NBC has a contractual right to Network Exhibition, against:

(a) theatrical and non-theatrical direct projection;

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(b) closed circuit TV in non-residential hotels, motels, bars, restaurants, hospitals and similar non-residential institutions;

(c) passenger-carrying vehicles;

(d) video discs, cartridges or cassettes or other such equipment.

(F) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier a first year pick-up option for exhibition of a prime time network entertainment program series based on a program designated by NBC and said supplier as a "pilot program" ("pilot") which is exercisable after the following times:

(i) where NBC has not advanced said supplier any part of the costs of pilot development, subsequent to the earliest date that the agreement contemplates that broadcast of the series may commence; and

(ii) where NBC has advanced said supplier any part of the costs of pilot development, more than one (1) year after delivery to NBC of the completed pilot, provided that as to those series which NBC does not include in the network schedule at the earliest date that the agreement contemplates that broadcast of the series may commence:

(a) for those pilots which have been delivered to NBC between October 2 of one year and April 1 of the following year, NBC must designate by June 1 of the latter year sixty-five percent (65%) of such pilots as to which

NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots; and

(b) for those pilots which have been delivered to NBC between April 2 and October 1 of the same year, NBC must designate by January 1 of the following year sixty-five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots;

and provided further that NBC may purchase additional first year pick-up options for series which NBC has not designated for release and for series which NBC has designated for option release but which NBC wishes to retain, so long as such additional options are acquired, for pilots described in Section VI(F)(ii)(a), after June 1, or after the announcement of the NBC television network schedule for the next broadcast year, whichever is later, and, for pilots described in Section VI(F)(ii)(b), after December 1, and so long as such additional options do not exceed increments of six (6) months.

For purposes of this Section VI(F):

A pilot shall be deemed to have been delivered to NBC when NBC has received, in the case of a film pilot, an answer print, and, in

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the case of a tape pilot, a program complying with customary tape requirements.

In computing the number of pilots to be released under Sections VI(F)(ii)(a) and (b), any fraction of a pilot shall be rounded off to the next lower whole number.

Unrecouped costs shall be deemed to be the amount of money advanced by NBC to an independent program supplier for the development of a pilot, except that if the NBC television network broadcasts a pilot once, two-thirds (2/3) of NBC's costs shall be deemed to have been recouped, and if NBC broadcasts a pilot more than once, all of NBC's costs shall be deemed to have been recouped.

(G) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier rights in excess of first negotiation and first refusal rights for a spinoff involving a non-continuing character.

For purposes of this Section VI(G):

First refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to

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NBC without giving NBC the first opportunity to meet such terms.

A non-continuing character shall be deemed to mean one who appeared in no more than twenty-five percent (25%) of the original episodes of the program upon which such spinoff is based during the twelve (12) months prior to the time exhibition rights to such spinoff are offered for licensing by said supplier.

(H) For a period of ten (10) years from the effective date of this Section, from purchasing from an independent program supplier a right to first run Network Exhibition of any television entertainment program series which includes the right to exhibit repeats of episodes in years subsequent to the broadcast year of initial exhibition of such episodes, provided that repeat rights to three (3) initial episodes per broadcast year of each such program series may be purchased for exhibition in subsequent broadcast years as part of the right to Network Exhibition, and provided further that additional rights to repeats may be purchased for exhibition in subsequent broadcast years, so long as negotiation for and acquisition of such additional repeat rights takes place after NBC has agreed to order episodes of such program series for the first year of broadcast as an NBC television network entertainment program series, and provided further that the limitation as to the use of repeats contained in this Section VI(H) shall not apply to (i) made-for-television and theatrical feature films, (ii) specials, and (iii) cartoons or other children's programs.

VII.

The following Sections of this Final Judgment shall not take effect until similar injunctive relief is obtained in Final Orders, Judgments or Decrees entered against CBS in United States v. CBS Inc., Civil Action No. 74-3599-RJK (C.D. Cal), and against ABC in United States v. American Broadcasting Companies, Inc., Civil Action No. 74-3600-RJK (C.D. Cal.) which are not appealable or from which no timely appeal is taken: V, VI(C), VI(E)(i), and VI(F) through (H).

VIII.

Nothing contained in this Final Judgment shall be construed:

(A) To prohibit NBC from acquiring rights for non-network broadcast of programs by NBC owned and operated television broadcast stations where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program.

(B) To prohibit NBC from seeking repayment, in whole or in part, of money or other consideration loaned, advanced or furnished by NBC in connection with the development or production of a television network program or of a project or activity that may result in a television network program, to the extent of the amount loaned, advanced or furnished, including interest.

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(C) To prohibit NBC from acquiring rights with respect to non-broadcast uses, including but not limited to publication of books or music, where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program.

(D) To prohibit NBC from selling, licensing, or distributing outside the United States programs (i) produced in foreign countries and not included in NBC's television network schedule, where the acquisition of such distribution rights is not conditioned, directly or indirectly, upon the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program, or (ii) produced by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

IX.

If a Final Order, Judgment or Decree is entered with respect to CBS in United States v. CBS Inc., Civil Action No. 74-3599-RJK (C.D. Cal.), or with respect to ABC in United States v. American Broadcasting Companies, Inc., Civil Action No. 74-3600-RJK (C.D. Cal.), which is not appealable or from which no timely appeal is taken, which shall order or decree for either CBS or ABC injunctions different in terms or provisions than those required by this Final Judgment, or which shall result in the dismissal of

either or both of such actions, NBC may apply to the Court and shall be granted a modification of or relief from any terms set forth herein as may be necessary to prevent NBC from being placed at a competitive disadvantage with respect to CBS or ABC.

X.

(A) Within thirty (30) days after the entry of this Final Judgment, NBC shall furnish to its officers, directors, and appropriate employees and agents a copy of this Final Judgment, and each year for a period of ten (10) years thereafter NBC shall furnish a copy to all new officers, directors and appropriate employees and agents. NBC shall maintain a file listing all persons to whom it has furnished such copies.

(B) Within thirty (30) days after entry of this Final Judgment and once each year during the succeeding ten (10) calendar years following entry of this Final Judgment, NBC shall send a copy of this Final Judgment to the last known address of each independent program supplier known to have offered any entertainment program to NBC for inclusion in its schedule of NBC television network programs within the preceding five (5) years and to each person listed in the then current issue of Television Factbook as a provider of television production facilities.

XI.

(A) For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, upon written request of

the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and on reasonable notice to NBC made to its principal office, shall be permitted, subject to any legally recognized privilege:

(1) access during the office hours of NBC to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of NBC relating to any matter contained in this Final Judgment; and

(2) subject to the reasonable convenience of NBC and without restraint or interference by it, the right to interview officers or employees of NBC, who may have counsel present, regarding any such matter.

(B) NBC, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested.

No information obtained by the means provided in this Section XI shall be divulged by any representative of plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XII.

Jurisdiction is retained by this Court for the purpose of enabling either party to this Final Judgment to apply to

this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XIII.

Entry of this Final Judgment is in the public interest.

Dated:

UNITED STATES DISTRICT JUDGE

APPENDIX A*

(a) "Agricultural programs" include market reports, farming, or other information specifically addressed, or primarily of interest, to the agricultural population.

(b) "News programs" include reports dealing with current local, national, and international events, including weather and stock market reports; and when an integral part of a news program, commentary, analysis, and sports news.

(c) "Public affairs programs" include talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international public affairs.

(d) "Religious programs" include sermons or devotionals; religious news; and music, drama, and other types of programs designed primarily for religious purposes.

(e) "Instructional programs" include programs (other than those classified under Agricultural, News, Public Affairs, Religious or Sports) involving the discussion of, or primarily designed to further an appreciation or understanding of, literature, music, fine arts, history, geography, and the natural and social sciences; and programs devoted to occupational and vocational instruction, instruction with respect to hobbies, and similar programs intended primarily to instruct.

* Taken from 47 C.F.R. §73.670, n.1 (1975).

(f) "Sports programs" include play-by-play and pre- or post-game related activities and separate programs of sports instruction, news or information (e.g., fishing opportunities, golfing instructions, etc.).

APPENDIX B

COMPLIANCE REPORT

NBC PRODUCED PROGRAMS

Compliance Period _____
No. weeks _____

Prime Time Hours

Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Non-Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Daytime Hours

Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Non-Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Fringe Hours

Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Non-Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Appendix B

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Form OBD-183
12-8-76 DOJ

WE KNOW HOW TO MAKE YOUR FUTURE PAY

January 13, 1977

Mr. Bernard M. Hollander, Chief
Judgements and Judgement Enforcement Section
Anti-Trust Division
U.S. Justice Department
Washington, D.C. 20530

Dear Mr. Hollander:

I am compelled to write to you today on a matter of the most serious urgency which threatens not only the existence of my small company, nor the development of the most exciting new communications medium to emerge in 25 years, but most importantly, a basic foundation of the American free enterprise system. I refer specifically to the unconscionable pay-television provisions of the proposed consent decree between the National Broadcasting Company and the U.S. Justice Department.

After reading and rereading all of the available documentation and media coverage of this situation, I still cannot believe that an anti-trust complaint against NBC in one area appears to be headed for settlement by permitting them new anti-competitive powers in another area. Our company, our industry, and indeed, our nation have all been founded on a single basic principle; the freedom of choice.

Pay-television is nothing more nor less than an option available to the American consumer. We offer the ability to view and enjoy the finest of current filmed entertainment in its pure unmutilated form. The subscribers we serve in 15 states have exercised their freedom of choice by voting with their dollars to bring this option into their homes. Am I now to believe that our government "of the people, by the people and for the people" is going to sanction one company's power to destroy this new found freedom? I pray not.

CINEMERICA, INC. 9477 Brighton Way, Beverly Hills, California 90210 (213) 550-1593

No one knowing the facts can fail to recognize the outcome if the pay-television provisions of the decree are adopted as presently written. If NBC can prevent motion pictures from reaching our subscribers they will prevent this. So too will ABC and CBS. Most simply, if NBC wins on this point it is the average American consumer who will suffer the greatest loss.

I urge you, please don't let this happen. You in your life goals, and I in mine, have both pledged ourselves to serving the public. I believe that in this instance this is best accomplished by not depriving them of the freedom of choice to which I refer.

Most sincerely,

Ken Silverman

Kenneth P. Silverman
President

KPS/lg
Encl.

Mr. Pepson
Mr. Hollander
Mr. Fuller
Mr. O'Reilly

Columbia University in the City of New York | New York, N.Y. 10027
SCHOOL OF THE ARTS
Office of the Dean

Dedge

13 January 1977

Mr. Bernard M. Hollander, Chief
Judgements and Judgement
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander:

I am writing in protest against the recent Consent Decree allowing NBC its special rights to theatrical movies against the interests of pay cable television.

My sole concern is that commercial motion pictures are the lifeblood of cable television at this particular time and if this avenue of revenue is snatched away cable television will not have the ghost of a chance of being able to develop viable public service programming in the Performing Arts.

I need hardly tell you that opera, ballet, symphonic music, chamber music, classical theatre and other areas of the arts have no real chance of regular television activity unless cable television becomes a strong programming force. Public television cannot do the job alone. The combination of cable and public television could create a real market for the arts with revenues that, in time, could become significant.

I urge you to reconsider what is in effect a cauterization of cable television's most obvious commerical avenues.

If you feel that further evidence on what I stated here is needed from me, please do not hesitate to tell me. I know whereof I speak: prior to coming to Columbia University I was General Manager of the Metropolitan Opera and before that actively involved in attempting to obtain television stages for various performing arts.

Sincerely yours,

Schuyler Chapin
Dean

SC/jb
cc: Mr. Bob Johnson

East Bay Skills Center
1100-47th STREET
OAKLAND, CALIFORNIA 94608
• TELEPHONE (415) 658-7356 •

Hopkins 3714
Mr. Hollander

January 19, 1977

Mr. Bernard M. Hollander, Chief
Judgements and Judgement Enforcement
Section, Anti-Trust Division
Washington, D. C. 20530

Dear Mr. Hollander:

I have recently been made aware of a recent Consent Decree concerning NBC that is the result of a Justice Department anti-trust suit. A provision of this decree would permit NBC certain exclusivity rights on movies as a protection against pay cable for a period equal to the life of the contract plus 30 days.

It is my feeling that this decree creates a new stumbling block to the growth of the fledgling pay cable industry and its services to subscribers. Motion picture products are the life blood of the present pay cable service. If the pay cable industry is prohibited from offering this home entertainment service to its 900,000 subscribers, it will be unable to economically expand into other areas of home entertainment such as cultural, childrens and special interests.

As Director of a primarily federally funded manpower training program conducting special vocational training in the trade occupations of the cable industry, we have great concern about any action that tends to curtail the cable industry.

Our training program, as you may know, is designed to serve unemployed and economically disadvantaged youth of the Bay Area. Cable T.V. and its industry partner, pay cable, are at a very important crossroads in their industrial life; a crossroads that effects the future career opportunities of the young men and women who we train.

Pay cable offers a new injection of life blood into the Cable T.V. industry which means more jobs for graduates of our program. It is my hope that you will carefully review this decree and extend some relief to this new industry so that it will be given a chance to grow in the marketplace of this Country's economic system.

Sincerely,

William R. Dabney
Director

WRD:pmj cc: Mr. Bob Johnson and Mr. Spencer Kaltz

A COMMUNITY SERVICE OF THE PERALTA COLLEGES

nccl
National Citizens Communications Lobby

L'S
1/31/77
Cite

January 27, 1977

Bernard M. Hollander, Chief
Judgments & Judgment Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander:

On behalf of the National Citizens Communications Lobby, I am writing to express deep concern about the provision relating to pay cable television in the NBC/Justice Department Consent Decree.

This provision will cripple the young pay cable industry by denying it access to its product. At present, pay cable relies primarily on first-run motion pictures for its survival. The Consent Decree would enable NBC in acquiring rights to a film to obtain exclusivity protection against pay cable for two years with the allowance for yearly extensions; pay cable could conceivably wait years before it could purchase a film. It is disturbing that the Justice Department settled for substantially less than what it originally recognized to be effective relief. The Competitive Impact Statement noted that reasonable exclusivity protection should extend a maximum 90 days: 45 days prior to and following the film's exhibition date.

The provision is anti-competitive. NBC is not seeking exclusivity protection against the exhibition of movies at home, on video discs, or cassettes, nor the exhibition of movies in theatres, hotels, and airplanes. Only pay cable is singled out. Pay cable has 900,000 subscribers; the networks have access to 74 million viewing homes. Yet the networks continue to view this industry as a threat, and they seek to maintain their near-monopolistic control of television programming.

Consumers should have the right to choose whichever manner of television entertainment they please. Pay cable offers its subscribers the opportunity to watch unedited, uninterrupted movies. The consumer should not be deprived of this service.

The NCCL supports the notion of diversity and competition within the media. We encourage the growth of pay cable as an alternative to commercial broadcasting.

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P.O.Box 19101 Washington, D.C. 20036 202-466-8290

Pay cable has great potential for expanding its services into cultural, educational, and children's programming. It would be a shame to see this potential go unrealized.

That this anti-trust suit brought about for the express purpose of opening competition in program production should result in crushing competition in program distribution would be a grim irony indeed.

We urge the Justice Department to reconsider this matter and either reinstate its earlier position calling for 90-day maximum exclusivity protection or delete the provision altogether.

Sincerely,

Melinda Halpert

Melinda Halpert
Executive Director, NCCL

Mr Hollander - 3706

The National Urban Coalition
1201 Connecticut Ave., N.W. • Washington, D.C. 20036 • 202 331-2400

February 10, 1977

Mr. Bernard M. Hollander
Chief
Judgements and Judge
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander:

On November 17, 1976, the U.S. Justice Department signed a Consent Decree with the National Broadcasting Company which may have profound and debilitating effects on the future growth and development of pay cable television.

As we see it, pay cable television provides the following services to our constituency - the poor, minorities, and working class city residents:

- Expanded job opportunities
- Increased opportunities for investment and business development for minority groups locked out of the established broadcast industry
- Additional avenues into local decision making through cable television coverage of such local activities as city council meetings
- The opportunity to view movies, sports events, and other entertainment for those who cannot afford to attend such functions
- New opportunities for cultural self-expression through increased variety of programs which appeal to the special interests of our constituents.

The provision in the agreement which relates to pay cable television would permit NBC, when acquiring rights to theatrical movies, to obtain exclusive protection against pay cable for a period equal to the life of the contract plus thirty days. The decree would, in effect, deny pay cable programmers access to motion picture product which is the lifeblood of the present pay cable service. The effect would cripple the cable television industry and prevent their expansion into other areas of home entertainment such as cultural, children's and other special interest programs.

Chairman Walter N. Rothschild, Jr. / President M. Carl Holman
Co-Chairpersons Andrew Heiskell, Vernon E. Jordan, Jr., James M. Roche, Sol M. Linowitz, Joseph J. Bernal, Aileen C. Hernandez
Secretary Clifford L. Alexander, Jr. / Treasurer Glenn E. Watts

We believe that every consumer should have the right to watch feature films in the form and manner they choose, without commercial interruptions. Further, the consent decree would seem to be contradictory to the principles of antitrust legislation which was enacted to prevent monopolistic practices that deny consumers freedom of choice and restrict the growth of competing industries.

Therefore, we urge you to consider the serious impact such a ruling would have upon our constituents and the millions of other television viewers who deserve an alternative to the present type of programming dictated by a few vested interests.

Thank you.

Sincerely,

M. Carl Holman

MCH:jg

AMERICAN CIVIL LIBERTIES UNION
22 East 40th Street New York, New York 10016 (212) 725-1222

February 10, 1977

Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Anti-Trust Division
Washington, DC 20530

Dear Mr. Hollander:

On November 17, 1976 the Justice Department signed a Consent Decree with the National Broadcasting Company in settlement of a four-and-a-half year old Justice Department suit aimed at curtailing the network's control over independent producers of entertainment programs. The Consent Decree contains a provision which would permit NBC to obtain "exclusivity protection" against pay cable television when acquiring the rights to theatrical movies for a period equal to the life of the contract plus thirty days.

The American Civil Liberties Union strongly opposes the exclusivity provision of the Consent Decree as harmful to the development of pay cable television, a new and important medium of communication which deserves the chance to compete with the established broadcasting structure.

The ACLU is committed to the principle that diversity of sources of expression in public communications systems will advance the exercise of freedom of speech and enhance the value of the guarantees of freedom of expression in the First Amendment. For this reason, the Union has long supported pay cable and subscription television as a means of expanding diversity of source of expression within the broadcast media.

To that end, the ACLU has objected to those rules promulgated by the Federal Communications Commission which place restrictions on the programs which can be televised via pay cablecasting. The Union sees such rules as an impermissible and unjustified government regulation of program content, molded for the protection of the established broadcast industry and disregarding the thrust of the First Amendment's purpose -- to encourage the dissemination to the public of a broad range of ideas and information.

Norman Dorsen, Chairperson, Board of Directors • Ramsey Clark, Chairperson, National Advisory Council
Aryeh Neier, Executive Director • Alan Reitman, Associate Director • Joel Gora, Acting Legal Director
Sharon Krager, Membership Director • John H. F. Shattuck, Director, Washington D.C. Office

Last February, the New York Times reported in a column by Les Brown that the Justice Department expressed agreement with the Union's assessment when it filed a brief in the U.S. District Court in Washington, D.C. challenging the rules governing pay-cable as anti-competitive, and charging that they were adopted by the FCC without regard for the public interest. Yet, the exclusivity provision in the Consent Decree is in clear derogation of diversity of source. By restricting the number of feature films available to cable subscribers, the Decree is cutting the lifeline of the present pay cable service at the request of, and for the sole benefit of, the established broadcast industry.

If the pay cable industry is prohibited from offering this home entertainment service, it will be economically unable to expand its developing special interest programming, such as cultural and children's presentations not often found on commercial television. The effect would be to blur the lines between pay cable and "free" TV to the detriment of the pay cable industry and the overall public interest.

Moreover, NBC's demand for protection against alternative television programming is clearly designed to preserve the network's monopoly over the TV viewing audience and the advertising revenues that are generated by commercial television. TV now reaches over 74 million homes and, according to their own estimates, network revenues should reach $13 billion by 1985. Pay Cable is currently viewed by 900,000 subscribers. The Consent Decree seems clearly to contradict the principles of antitrust legislation, which was enacted to prevent monopolistic practices that deny consumers freedom of choice and restrict the growth of competing industries. The Decree can, we believe, be labeled a blatant attempt by a network to strangle the infant pay cable industry.

It should be noted that the Justice Department itself originally recommended, in its Competitive Impact Statement, that a reasonable period of network exclusivity should be no more than 90 days: "only 45 days before and after the exhibition date of a feature film." Somewhere along the route to the Consent Decree agreement, this recommendation from the investigating attorneys

was discarded. Apparently, in its desire to get the broader settlement, the Justice Department sacrificed important rights of the pay cable industry and the American public.

The American Civil Liberties Union opposes this part of the Consent Decree as not being in the public interest. We strongly urge the Justice Department to delete the exclusivity provision from the Consent Decree with NBC in the interest of that diversity and competition in public communications which is essential to First Amendment freedoms.

Sincerely yours,

Aryeh Neier

Aryeh Neier
Executive Director

Harriet Pilpel

Harriet Pilpel
Chairman, Communications
Media Committee

3706 Mr. Hollander

Legal Defense Fund
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
12 Geary St., San Francisco, Calif. 94108 • (415) 788-8736
(National Office: 10 Columbus Circle, N. Y., N. Y. 10019 • 586-8397)
Allen Black, Jr., Director
DIVISION OF LEGAL INFORMATION AND COMMUNITY SERVICE
WESTERN REGIONAL OFFICE

February 16, 1977

Mr. Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander:

This Division represents, assists and/or associates with over a dozen community groups in more than eight states which are working, through actions before the Federal Communications Commission and in Federal court, to assure adequate treatment from the media in the areas of ascertainment, programming and employment for minority communities. It is on behalf of these community groups that we oppose the proposed consent decree between the Department of Justice and the National Broadcasting Company.

At the same time, we are acutely aware of the attempts of minority groups to own and operate cable systems. According to N.C.T.A. there are presently 30 communities where franchises are principally owned by Black, Indian or Spanish surnamed persons. New systems controlled by Blacks are currently operating. The problems faced by any new franchise holder are great, for minorities they become even more formidable. If this fledgling group of minority entrepreneurs is to fulfill its promise they must not be hampered by additional burdens. We believe that the proposed consent decree will do irreparable harm to their efforts.

To be sure, the industry has not lived up to its potential to service the minority community. One reason may be that they lack the adequate re-

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sources to do so. A major source of income and one of their more attractive features is the ability to present first run movies, and other special events not otherwise available.

The proposed consent decree will take away from them this asset and at the same time it will allow NBC to freeze out its competition. The decree will also affect cable television's potential to provide diverse special interest programming, deny to consumers their right to watch feature films in the form and manner they choose, and perpetuate the networks monopoly of television entertainment.

We do not want anyone, cable, network or webs to have any excuse for its failure to adequately service the needs of the minority communities. The proposed consent decree provides such an excuse and we oppose it.

Very truly yours,

Allen Black Jr.

Allen Black, Jr.
Director
Division of Legal Information
& Community Service
Western Regional Office

ABJr/aph

ACT
ACTION FOR CHILDREN'S TELEVISION
46 AUSTIN STREET
NEWTONVILLE, MA. 02160 617-527-7870

3706 Mr Hollander

February 16, 1977

Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Re: Consent Order Between the United States Department of Justice and the National Broadcasting Company

Dear Mr. Hollander:

Action for Children's Television would like to express its views regarding the Consent Decree between the United States Department of Justice and the National Broadcasting Company signed November 17, 1976.

Action for Children's Television, Inc. (ACT) is a non-profit corporation organized under Massachusetts Law for the purpose of improving programming for children. It has local affiliates in principal cities in the United States and a national constituency including several thousand dues paying members.

ACT supports diversity in programming for children. We believe that the child audience should be provided with age-specific programming. Further, we believe this programming should include public affairs, news, educational presentations, and dramatic offerings that will expose the child to literature and theatre appropriate for young viewers. ACT supports programs that broaden the child's horizons and are free from racial, sexual, and age stereotypes.

ACT is concerned that the present Consent Decree between the Justice Department and NBC might operate to limit public

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P.R.O.

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ALBERT J. SOLNIT M.D
Professor of Pediatrics Yale University Child Study Center

access to diverse programming, including the potential for diverse programming for children. The section of the Consent Decree that relates to the exhibition of first run movies on television appears to promote "contract exclusivity" against pay cable and subscription television and consequently deny pay cable television a product critical to its growth. If this section of the Consent Decree will in fact inhibit the growth of cable television, the viewing public will be denied an important alternative to present programming. Such a result would run contrary to the underlying principle of the Consent Decree.

Pay cable has indicated its interest in programming for children. It would be unfortunate if as a result of the economic impact of the Consent Decree this programming was curtailed.

Sincerely,

Rachel Wolkin

Rachel Wolkin
General Counsel
on behalf of Action for Children's Television

RW:fb

3706 Mr. Hollander

MET

Metropolitan Opera Association, Lincoln Center, New York, New York 10023 (212) 799-3100

Michael Bronson, Technical Administrator

February 16, 1977

Bernard M. Hollander, Chief
Judgements and Judgement
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Gentlemen:

The Metropolitan Opera Association wishes to submit herein its comments on the Consent Decree signed by the Justice Department with N.B.C. in so far as this Consent Decree affects the Association's interests in pay cable television service.

In September 1974, Schuyler Chapin, then General Manager of the Metropolitan Opera Association, submitted comments to the F.C.C. concerning Docket Number 19554. In the two and a half years since that submission, the needs of the Association have increased substantially. The potential of pay cable television to substantially reduce our operating deficit and at the same time enable the Association to reach a wider audience is dependent on a healthy pay cable television industry.

This "Consent Decree" as signed, in our opinion, would restrict the pay cable television industry in a way that would limit its ability to deal with special interest programming such as might be provided by the Metropolitan Opera Association.

We hope you will read carefully Mr. Chapin's letter of September 10, 1974 and consider again the affect that the Consent Decree could have not only on pay cable television but on the important cultural institutions of America.

Sincerely,

Michael Bronson

MB:eg
Encl.

Cable Address: Metopera, New York

27 P.A.O.

METROPOLITAN OPERA

METROPOLITAN OPERA ASSOCIATION, INC.
LINCOLN CENTER

SCHUYLER G. CHAPIN
GENERAL MANAGER

NEW YORK, N. Y. 10023

September 10, 1974

Federal Communications Commission
1919 M Street, N.W.
Washington, D. C. 20554

Attention: Hon. Vincent J. Mullins, Secretary
Docket No. 19554

S&2

Gentlemen:

The Metropolitan Opera Association wishes to submit herein its comments in response to the FCC's Further Notice of Proposed Rule Making and Order for Oral Arguments released on August 12, 1974, in connection with the pay cable TV rules proceeding. Our chief aim in responding in writing now is to make the Commissioners aware of our concern that rule making in relation to pay cable TV should forthwith take into active account the minority interests of millions of Americans, those not now being adequately served by open airwaves TV. While our purpose in the narrow sense is to help make possible the video reception at home by Americans via pay cable TV of opera and other fine music programming, our aim is far wider.

This nation thinks of itself as enlightened and sophisticated, as it nears its 200th birthday. It has seen its way of life attract tens of millions to its shores and exported its culture and goods to hundreds of millions more. This nation also stands as the world exemplar of free enterprise, a setter of trends and keeper of traditions. It boasts the best informed, best educated yet most diverse, most individual citizenry in the world. It is, beyond all this, a nation dedicated to the principle that anyone within its shores may pursue the life of his choice, with law and custom.

Yet in one increasingly important sector of our national life, this principle of individual choice is not adequately respected. That sector is the field of mass communications (both radio and TV). Since our remarks here relate to FFC Docket No. 19554, which proposes to deal solely with rule making in pay cable TV, we shall not deal with the larger broadcast issue in America, save to note that good music is largely absent from TV, eroding from radio, and that our Saturday afternoon broadcasts from December to April, sponsored by Texaco on our own network, constitute the sole remaining example of good music "live" anywhere on the nation's airwaves.

ARIA CORP 212

The problem, as we all know, has to do with free enterprise when applied to a mass medium for the generation of profit. The decision to leave broadcasting in private hands in the U. S. was made nearly 50 years ago, at the birth of radio. The consequences are clear. Slowly over the ensuing years minority audience interests have been all but eliminated from the system, except in isolated independent low-cost pockets, as the service of those interests proved unable to generate revenues sufficient to satisfy stockholders. In this respect we are now unique among the major civilized broadcast nations of the world. We have permitted a majority of our people to become significantly disenfranchised, by deciding to serve only those of their interests which make money.

Paralleling this dilemma is that of the major cultural arts institutions of the nation, those who have always appealed to minorities and have never made money, among which the Metropolitan Opera is without peer. Each year the Metropolitan Opera Company presents in New York City and on tour an eleven-month season of major productions, drawing on the world's outstanding talents in the field, and on which it has always lost money. Faced as we are with rapidly rising costs, yet without any fresh sources of finance to meet the alarming deficit gap, the result, this year alone, has been to shorten the Metropolitan Opera season for the first time since 1934. In addition the Company dropped two planned new productions, among many other measures aimed at assuring at least a short term survival for the Company as we seek fresh solutions to the income problem.

Over the years many have asked why the Metropolitan Opera did not defray some of its costs by licensing telecasts of opera performances to one of the commercial networks. There was a brief honeymoon with the networks in the early 1950's, and even one closed circuit theatrical test. Since then it has been clear that our broadcast and financial future did not lie in this direction. Later there was talk of public television, but economic strictures in that field do not at present permit this to offer an alternative. Finally it is being suggested to us by some now that pay cable TV is the new technology that can break the impasse. The problem is that pay cable TV is still an infant industry, hardware-oriented and capital intensive. Neither we here at the Metropolitan Opera, nor any of our sister cultural institutions, theaters and museums, can ever hope to find part of our own long-term fiscal answer there unless the infant is encouraged to grow, as reasonably quickly, freely and unencumbered by excessive restrictions as possible.

In order to grow, pay cable TV must attract subscribers. To do this, it seeks to enter the general broadcast marketplace and compete for the right to control some part of the mass entertainment spectrum, most notably feature films and sports. The commercial networks object. Yet it is clear that without an increased pay cable TV audience base, which such popular programs would undoubtedly attract, institutions like ours will have to wait a long time before pay cable TV systems can generate sufficient revenues to license any cultural-events programs of consequence, even for a nominal fee.

Were pay cable TV to concentrate solely on movies and sports, both already supplied "free" by network TV (with commercials, whose cost and network time is built into the product price paid by the consumer), the anguish for the network stockholder would be understandable. But pay cable TV does have the opportunity to provide more diversity, and knows it must do so if it expects to be given the right to compete with network TV on any part of its own "traditional" home ground. The FCC has recognized this in previous rule making, such as the 90-10% rule, but those rules have tended to be restrictive rather than offering incentive for a job well done.

How can cable TV ever hope to do this "better job" of programming and make it adequately rewarding for all parties unless it is encouraged to do so at this critical point? Excessive restriction on competition can only hold it back. Now, some would have pay cable TV banished to doing only those jobs that don't pay or build mass audiences. A widely distributed network brochure recently stated:

> "There are only so many channels on the broadcast television dial. Broadcasters are charged with serving mass audiences; there is simply not enough time in the day to offer all the programs for which small, specialized audiences exist. Cable television offers an abundance of channels--24 or 40 in many places, with reports that the number may someday rise to 100. Thus, cable television can bring to the public a wide variety of services that broadcast television does not offer at this time, ranging from presently untelevised cultural events to new services like shopping by television."

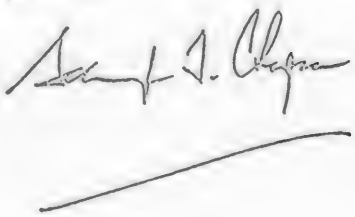
The example set by the program schedules of other major broadcast nations, (where free enterprise does not define the marketplace for program decision-making) gives the lie to this argument, which amounts to a plea that "we haven't been able to figure out how to make a profit out of programs except those that appeal to the largest public. So since we've thrown in the towel, why not give cable-TV a chance. Maybe they'll come up with a fresh answer." Another version of this argument is the time-worn American game of "Let's you and him fight."

Well, surprisingly enough, pay cable TV seems willing to give it a try. But pay cable TV today does not have an audience base capable of generating the thousands of dollars involved in mounting opera and other major cultural-event programming, not to mention countless other program types appealing to minority interests. We at the Metropolitan Opera have a vested interest in maing certain that those 24-40-100 channels do ultimately offer the program diversity to which the American public is entitled. We would be less than candid if we did not acknowledge that eventual income from pay-TV sources is part of our active current planning. As we have said, the old sources of private finance are no longer sufficient to handle the Metropolitan Opera's deficit. We regard it as a major priority to find and develop new sources of income to meet our present and future needs. Pay cable TV is at the heart of our nking.

The Metropolitan Opera urges the FCC to keep the debate on rule making in pay cable TV open to the consideration of the consequences of present or future rules to the ability and encouragement of the pay cable TV industry to undertake cultural and minority programming. In particular we would be pleased to address ourselves to the 90-10% rule on program content (the 90% being the maximum allowed for movies and sports). We are prepared to be present at your October oral hearings, if you choose to invite us, and will offer such further suggestions then, or at another time or in writing if you prefer, as we hope may be helpful to the debate.

The rules you adopt for pay cable TV now will set precedents and dominate the future of this industry for the next decade or two. The test for all of us is to determine whether private enterprise can at last provide a broadcast spectrum whose quality in diversity can become the equal of those elsewhere, while offering the consumer a pay-choice previously closed to him, because it had been decided for him by broadcasters' rules of "good business." We believe that TV customers who wish to satisfy a taste for opera, or any other minority program interest, will in most cases consider paying for the privilege. The Metropolitan Opera cannot reach those customers without the swift, healthy growth of the pay cable TV industry. That growth will be most encouraged by the least restriction combined with incentives. We believe pay cable TV is willing to shoulder its share of this opportunity, and can, if allowed, offer a service which perhaps only pay cable TV has any remaining hope of providing to a long-deprived American public. And in allowing this to happen, you will also provide an essential life-line to the cultural well-being of the nation for the remainder of the century and beyond.

Sincerely,



SGC

Nicholas Johnson

22 February 1977

Bernard M. Hollander, Chief
Judgements and Judgement Enforcement
Section
Anti-Trust Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Hollander:

I am writing to you to voice my reservations over the provisions of the NBC/Department of Justice consent decree which concern pay cable television. My concern focuses on section VI (E) (iii) of the proposed final judgement. This section would allow NBC to obtain exclusivity against pay cable and subscription television for a period beginning 30 days before the availability date for the feature film, and running up to 24 months after two runs of the movie, plus 12 months for every subsequent run.

While a member of the Federal Communications Commission (1966-1973), and since then as Chairperson of the National Citizens Committee for Broadcasting, my paramount concern has been the protection of the public's right to diversity, access, and information from its communications network. The public has a right to benefit from new technologies, and from, whenever possible, the benefits of free competition.

Pay cable offers the potential for a whole new era in home entertainment. The economic structures of such a system offers hope for greater availability of minority and special interest programming. Whole new areas of culture, entertainment, information, art, children's programming, theatre, and history could bloom under a system of pay-per-program television. I am not starry-eyed about the prospects; it will probably take a great deal of vigilance and attention from the public to guarantee that such services are provided But there can be no opportunity for such development if the pay cable industry is not allowed to grow out of its infancy.

The commercial, over-the-air broadcasters have been doing their darndest to prevent the fulfillment of this potential. While paying lipservice to the concept of free competition, and complaining about government regulation as attempts to interfere with their "freedom of speech," the broadcasting industry

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DEPARTMENT OF JUSTICE
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A/... R.A.O.

P.O.Box 19101 Washington, D.C. 20036 202-466-8290

has used every device within reach to limit competition, and to stifle new communications services that it sees as threatening

This is true of the practice of insisting on long exclusivity agreements on feature films, for which NBC is now trying to gain government sanction Such agreements could smother pay cable before it gets off the ground, thereby denying the choice it offers to the public. These agreements immediately deny the public the freedom to choose the time, manner, and form in which they wish to view films-- and for no good reason. The networks are simply using their immense economic muscle unreasonably to block pay cable competition.

It is ironic that what began as an anti-trust action could end in government sanction of this anti-competitive practice

NBC's intention is clear-- the crippling of the pay cable industry Of all the other forums in which movies are shown-- at home, in theatres, hotels, and airplanes, or through distribution of video discs and cassettes-- only pay cable has been singled out for exclusionary treatment. Isn't that odd? Why do you suppose that is?

I suggest it is because NBC realizes the vast potential of this fledling industry, and knows of its dependance upon the first-run features for its substanance and growth in its present infant stage

Even the Justice Department initially recognized the anti-competitive nature of these exclusivity agreements. DOJ attornies originally argued that a 90-day exclusivity period (45 days prior to and after the actual air date) was sufficient protection for the network. This position was apparently abandoned out of a desire to reach an overall settlement. That, however, does not change the important public interest and anti-trust considerations that led Justice to its original stand.

Let me hasten to add-- lest there be any suspicion that I have naively been won over by the equally rapacious pay cable entrepeneurs-- that I would and do oppose with equal force your giving them any anti-competitive exclusivity protection.

The underlying purpose of the anti-trust laws is to prevent monopolistic practices that deny consumers freedom of choice and restrict the growth of of competing industries. It is particularly important in the communications industry that we make available to the public as many different sources of

Bernard M. Hollander 22 February 1977
Page 3

information and entertainment as is possible without creating technological or economic chaos. This provision of the consent agreement flies in the face of these principles.

I hope you will seriously consider this question of the public's rights to as much diversity and competition as possible. I think the evidence shows that, considered solely on its own merits, this provision of the consent agreement is anti-competitive, anti-consumer, and an unnecessary boon to an already powerful corporation.

Sincerely,

Nicholas Johnson

3706 Mr. Hollander
Kaplan 3214
Film

AMERICAN TELEVISION & COMMUNICATIONS CORPORATION
360 SOUTH MONROE STREET • DENVER, COLORADO 80209 • PHONE (303) 321-2224

MONROE M. RIFKIN
President

January 14, 1977

Mr. Bernard M. Hollander
Chief, Judgments and Judgment
Enforcement Section
Anti-Trust Division
U. S. Department of Justice
Washington, D. C. 20530

Re: United States of America v. National Broadcasting Company, Inc. (Central District of California - Civil No. 74-3601-RJK)

Dear Mr. Hollander:

The proposed Final Judgment in the case of the United States of America v. National Broadcasting Company, Inc. would have a serious anti-competitive impact on the developing pay cable television and subscription television industry and would severely limit the public's opportunity to view commercial-free feature films in their own homes. Section VI(E)(iii)(e) of the proposed Final Judgment would allow NBC (and, by implication, ABC and CBS) to exercise their vastly superior economic bargaining position to require producers of movies to grant the networks, exclusive exhibition rights, against pay television, commencing 30 days prior to the date of availability for exhibition and ending on the last date of availability, so long as the period of availability does not exceed two years, plus one additional year for each exhibition in excess of two exhibitions for which a network acquires rights. The FCC rules confer territorial broadcast monopoly on the networks, so why should the Justice Department sanction their attempts to secure film exhibition exclusivity? The networks, by exercising their dominance and control over access to their broadcast time to force independent program suppliers to grant exclusive movie rights to the networks, would severely restrict the ability

of the pay television industry to obtain movies and thereby place the pay television industry at a severe competitive disadvantage.

The pay television industry is an infant industry which relies on movies as a critical source of programming. The industry cannot compete with the networks if it is denied the right to exhibit major, first-run movies shortly after the movies have completed their theatrical exhibition period, and it cannot spend the enormous amounts available to the networks to purchase films.

The proposed Final Judgment, in conjunction with the FCC pay television rules, would allow the networks to unreasonably exercise their extensive economic and other power to acquire exclusive rights to a film as soon as it clears the theatres, to hold the exhibition rights without exhibiting the film (i.e. "warehouse" the film) for a two-year and one-month period, exhibit the film on the last day of the warehousing period, and thereby prevent the exhibition of the film on pay television during the initial time that the FCC rules permit pay television exhibition -- the most competitively critical time. Then, for an ensuing seven-year period, the networks could prevent the exhibition of the film by simply declining to seek exhibition rights. At the expiration of the seven-year period, the networks could continue to prevent pay television exhibition by warehousing the film for additional periods as authorized by the proposed Final Judgment.

If the networks are allowed to deny movie exhibition rights to pay television, they will deprive hundreds of thousands of existing pay television subscribers, and a far greater number of potential pay television subscribers, of their right to watch quality motion pictures in their homes without constant commercial interruptions and at times convenient to them. The proposed Final Judgment would be an invaluable and invidious tool in the hands of networks to be used to drive commercial-free television from the marketplace and to force television viewers to watch commercial-laden movies which increase network profits in proportion to

Mr. Bernard M. Hollander
January 14, 1977
Page Three

the number and length of commercials which suit the pleasure of the networks.

I urge, therefore, that the Department of Justice delete the anti-competitive, anti-pay television provision from the proposed Final Judgment so that the infant pay television industry may have an opportunity to develop, free from artificial restraints of trade, to enable it to serve the television-viewing public in a manner that affords that public, basic freedom of choice in home entertainment.

Very truly yours,

Monroe M. Rifkin
President

MMR/vi

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M. JONATHAN HEYMAN

MARTIN RIGER
ROBERT PITOFSKY
OF COUNSEL

February 25, 1977

Bernard M. Hollander, Esquire
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: Comments of Twenty-Four Companies in the Pay Cable Industry on the Proposed Consent Judgment in United States v. National Broadcasting Company, Inc., Civil Action No. 74-3601-RJK, U.S.D.C., C.D. Cal.

Dear Mr. Hollander:

We represent twenty-four companies in the pay cable industry (identified in Attachment A to our accompanying comments) in connection with proceedings concerning the proposed consent decree filed in United States v. National Broadcasting Company, Inc., Civil Action No. 74-3601-RJK, on November 17, 1976, in the United States District Court

for the Central District of California. We submit the accompanying comments on behalf of our clients pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d).

We urge the Department of Justice to withdraw its consent to the proposed decree.

This case marks a sharp departure from the Department's usual practice of pursuing effective antitrust relief and ending predatory practices and barriers to entry created by oligopolistic firms like the defendant networks. We object to the decree because it not only would not halt, but would explicitly approve, the continuation of anticompetitive network practices which are calculated to stifle the pay cable industry in its infancy. In particular, the decree would specifically authorize NBC to obtain exclusivity against pay cable exhibition on feature films during the entire period films are available under contract for network exhibition. Further, in combination with the restrictive rules promulgated by the Federal Communications Commission, the decree would have the practical effects (i) of limiting pay cable, in the case of films released in theatres during the preceding three years to those cases where the films are no longer running in theatres and the networks have not contracted for them, and (ii) of denying pay cable any real opportunity to exhibit films of a greater age.

For reasons presented in our comments, the exclusivity approved by the proposed decree is unreasonable -- as indeed would be any exclusivity against pay cable. We, therefore, urge the Department to withdraw its consent and to negotiate adequate relief with NBC. Should a proposal be made to limit exclusivity to a period not in excess of 15 days prior to each network exhibition of a feature film (and not at all thereafter) as a compromise, our clients would not further object. If such relief is not obtained

ARNOLD & PORTER

Bernard M. Hollander, Esquire
February 25, 1977
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through consent in the instant litigation, we urge the Department to continue litigation against the networks in order to end the networks' use of exclusivity as a means of throttling pay cable.

After you and your staff have had an opportunity to review our comments, we request the opportunity to confer with you concerning this matter. In addition, we would request the opportunity to meet with the Assistant Attorney General in charge of the Antitrust Division at any appropriate time before the Department reaches a final decision as to whether it will withdraw its consent to the proposed decree.

We look forward to further consultation with you.

Sincerely,

ARNOLD & PORTER

By _____
Dennis G. Lyons

COMMENTS OF

AMERICAN TELEVISION & COMMUNICATIONS CORP.; CABLECOM-GENERAL, INC.; CABLE INFORMATION SYSTEMS, INC.; CENTRAL CALIFORNIA COMMUNICATIONS; COMMUNICATIONS PROPERTIES, INC.; CONTINENTAL CABLEVISION, INC.; COX CABLE COMMUNICATIONS; DANIELS PROPERTIES, INC.; GOOD-VUE CATV, INC.; HARRIS CABLE CORPORATION; HERITAGE COMMUNICATIONS, INC.; HOME BOX OFFICE, INC.; INERTIA, INC.; LIBERTY COMMUNICATIONS; MANHATTAN CABLE TELEVISION; MID-WEST VIDEO; SAMMONS COMMUNICATIONS, INC.; TELE-COMMUNICATIONS, INC.; TELESIS CORPORATION; TELEPROMPTER CORPORATION; THE TM COMMUNICATIONS COMPANY; UA COLUMBIA CABLEVISION, INC.; UNITED CABLE TELEVISION CORPORATION; VISION CABLE COMMUNICATIONS, INC.

IN OPPOSITION

TO THE

PROPOSED CONSENT JUDGMENT

FILED IN

UNITED STATES OF AMERICA v. NATIONAL BROADCASTING COMPANY, INC.

UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. 74-3601-RJK

Dennis G. Lyons
Leonard H. Becker
Steven P. Lockman
Albert H. Kramer

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Dated: February 25, 1977

COMMENTS OF TWENTY-FOUR COMPANIES IN THE PAY CABLE INDUSTRY IN OPPOSITION TO THE PROPOSED CONSENT JUDGMENT IN UNITED STATES V. NATIONAL BROADCASTING COMPANY, INC.

I. PRELIMINARY STATEMENT

The proposed consent decree in this case is an extraordinary document. The Department of Justice ("Department") filed this action and the companion suits to end the networks' repeated abuses of their dominant power as purchasers of television programs. The Complaint sought broad and effective relief. Yet, the Department has now agreed to a proposed decree which not only would not halt such abuses but would explicitly permit the continuation of the networks' current practices of obtaining unreasonable exclusivity to deny the pay cable industry access to feature films. The conduct approved, which is calculated to destroy the pay cable industry in its emergent stage, is in clear violation of the antitrust laws.

The Department is the last party we would expect to support the oligopolistic networks in their efforts to suppress potential competition. In putting its imprimatur upon the networks' improper activities, the Department not only abandons its commitment to obtain effective relief against the networks but neglects its task of promoting healthy competition and assuring that new entrants are not denied a fair opportunity to compete.

We urge the Department to reconsider its action, to withdraw its consent to the proposed decree, and

to pursue meaningful relief against the networks.

II. BACKGROUND

Pay Cable is One of the Few Hopes of Breaking the Networks' Stranglehold on Television Viewing -- and It is For This Reason That The Networks Have Consistently Sought to Destroy This Emerging Industry.

The Department is familiar by reason of its participation in various FCC and court proceedings with the emerging pay cable industry and with the networks' efforts to thwart its development. We will, therefore, confine our description of the pay cable industry and its relationship to the networks to the most essential elements.

The Department is also familiar with the oligopolistic position of the three television networks -- defendants in this case and its companion cases. The networks currently have a "stranglehold"[1/] on the selection of the program material that will be shown on home television. The pay cable industry is one of the few hopes for at least some relaxation of that stranglehold.

1/ National Association of Independent Television Producers and Distributors v. FCC, 502 F.2d 249, 251 (2d Cir. 1974).

Our clients are twenty-four of the leading companies in the industry. (For identification, see Attachment A.) They include both owners of cable systems and suppliers of pay cable programming. Our cable operator clients provide service to the substantial majority of the approximately 1,000,000 pay cable subscribers in the nation. The basic cable service consists primarily of transmitting over-the-air broadcast signals to the viewer. Pay cable provides additional nonbroadcast programs to subscribers for a monthly fee in addition to the basic cable charge.

Pay cable provides its subscribers the opportunity to view motion pictures, sporting events, and special-interest programs unedited and without commercial interruption. Motion pictures currently are the principal program attraction and comprise a substantial majority of the hours of programming shown on most pay cable systems. Films are presented on pay cable channels in original, unedited form, and uninterrupted by commercials. Ordinarily, a pay cable system exhibits a film repeatedly over a few months to afford its subscribers the opportunity to view the film at their convenience. Pay cable subscription charges generally range from $7 to $10 per month, and subscribing families, therefore, may view motion pictures, sports events, special attractions

and other events for only a fraction of the price of box office admission.

Pay cable's significant reliance on motion pictures makes the industry highly dependent on its ability to obtain access to quality feature films. The supply of such films, however, is quite limited because there has been a sharp decrease in the number of feature films produced. While at one time more than 400 new playable feature films were released annually by Hollywood, slightly over 100 are released currently each year.

Pay cable's difficulties in obtaining films are heightened by the restrictive rules issued by the Federal Communications Commission which the Department, like the pay cable industry and many public interest groups, has opposed as adverse to the public interest. These rules are discussed in further detail below. Their practical effect, however, in light of the networks' practices of obtaining exclusivity against pay cable, is to limit pay cable, in the case of films released in theatres during the preceding three years to those cases where the films are no longer running in theatres and the networks have not contracted for them, and to deny pay cable any real opportunity to exhibit films of a greater age.

Pay cable is vital to the development of the cable industry. Pay cable not only can provide needed revenues for the capital intensive cable industry but also can attract new subscribers for the basic cable service. Pay cable also has the potential to offer diverse types of programming which appeal to more specialized tastes. It bears emphasis here, however, that in order to achieve its potential, pay cable must depend on a base of programs of broad appeal such as motion pictures to provide it with a stable economic base and solid foundation for growth and development.[2/]

Dwarfing the pay cable industry, the three television networks reach nearly 80,000,000 homes. Studies have shown that each television home views network and other broadcast programming on the average of 46 hours per week. Pay cable subscribers, on the other hand, view 3-4 hours of pay cable programming weekly. Pay cable program hours, therefore, represent only about one-tenth of one percent of conventional television hours watched. Network net incomes in 1976 were an all-time record.

2/ As Henry Geller, former General Counsel of the Federal Communications Commission, testified during the Commission proceedings:

> "Third, and this is very important . . . the studies all show that the only way you are going to get in minority taste programs is on a successful pay TV system, and that means using sports and movies." FCC Docket No. 19554, Hearings, Tr. 127.

Network programming has been marked by its lack of diversity. Because broadcast television has a scarcity of spectrum space and must depend on advertisers for revenues, air time has been used for programs of mass appeal in order to attract the largest possible audiences. "Unlike other media, television presently provides relatively uniform programs from a limited number of sources."[3/]

The networks -- the creatures of government-granted licenses and chain affiliations with other licensees -- have sought to preserve their dominant and "stranglehold" positions by stifling the pay cable industry. They have attempted to thwart pay cable's development in every conceivable forum. They have successfully argued for restrictive FCC rules limiting pay cable's access to feature films and sporting events and have lobbied against pay cable in Congress and before state agencies. The networks' campaign continues, and the Department's proposed action here -- approving the networks' aggressive use of exclusivity to deprive pay cable of feature films -- can only give aid and comfort to the networks in their attempt to destroy the pay cable industry in its infancy. The networks' activities violate fundamental antitrust principles and threaten to deprive the public of the benefits of more diversified programming.

3/ Final Report of the President's Task Force on Communication Policy, Ch. VII, at 4 (1968).

III. EFFECT OF THE PROPOSED DECREE

Abandoning the Stated Purposes of the Complaint, the Proposed Decree Expressly Approves Exclusivity Against Pay Cable on Feature Films During the Entire Period of Availability to the Network.

The government instituted these actions against the networks to curtail abuses of the networks' dominant power as purchasers of television programs. The complaints alleged that each network had "used its control over access to . . . [network] broadcasting time . . . during prime evening hours" to deny program suppliers an opportunity to market programs on a competitive basis. Complaint, ¶ 17. Thus, the complaints alleged that the networks had compelled program suppliers to grant the networks financial interests in their programs and had excluded programs in which the networks were granted no ownership interest. Complaint, ¶ 17(a), (b).

In addition, the complaints charged that each network had used its dominant position as a purchaser of television programs

> "[t]o obtain a competitive advantage over other producers and distributors of television entertainment programs and of motion picture feature films." Complaint, ¶ 17(e).

In connection with the latter allegation, one of the specific prayers for relief against each network was

that it be prohibited from using its position as a dominant purchaser "to foreclose competition or obtain an unfair competitive advantage in any other field." Prayer, ¶ 6.

The Department claims that "[t]he proposed judgment provides relief similar and substantially equivalent to that requested in the complaint." Competitive Impact Statement, at 2-3. This assertion is inaccurate. The proposed decree not only fails to prohibit NBC's abuse of purchasing power "to foreclose competition," but indeed expressly approves NBC's practice of demanding unreasonable exclusivity against pay cable. Such exclusivity serves no purpose other than to cement the networks' entrenched position by depriving the pay cable industry of its most important product and impairing its ability to compete. The proposed decree, therefore, would put the Department's imprimatur on precisely the type of network abuse that this suit was intended to prevent. Thus, the position of the pay cable industry is worse if the consent decree is entered with the provisions in question in it than if the Department had never even filed the complaints in these cases. In addition, as described in Section IV C below, the decree would permit the very kind of restriction against pay cable that the Department has consistently opposed in the past as adverse to the public interest.

The approving impact of the proposed decree is clear. Section VI(E)(iii) contains five subsections with respect to network exclusivity on feature films. The first four subsections are flat prohibitions and would bar NBC from obtaining any exclusivity against

(a) theatrical and nontheatrical projection;

(b) closed circuit TV in nonresidential hotels, motels, bars, restaurants, hospitals, and similar nonresidential institutions;

(c) passenger-carrying vehicles;

(d) video discs, cartridges or cassettes or other such equipment.

Subsection (e), which deals with network exclusivity against pay cable, contains no such prohibition. Rather, the subsection expressly provides as against pay cable

> "that NBC may acquire exclusive rights to any such feature film commencing thirty (30) days prior to the first date and extending until the last date on which NBC may broadcast such feature film under the contract between NBC and such supplier, so long as this period of exclusivity between the first and last dates on which NBC may broadcast such feature film under such contract does not exceed twenty-four (24) months, and does not exceed twelve (12) additional months for each exhibition greater than two (2) to which NBC acquires the exhibition rights."

Section IV(A) of the proposed decree is also directly relevant. This provision limits the interests which NBC may obtain in television programs, but then presents a lengthy list (32 in number) of "examples" of "subject matters" which may properly be included

in any "agreement granting NBC the right to Network Exhibition." Among the explicitly authorized "examples" are "exclusive exhibition rights (except as limited by Sections VI(E)(ii)-(iii))." Clearly, the effect of this language is affirmatively to approve, as permissible in every network license of a feature film, the broad exclusivity against pay cable authorized by Section VI(E)(iii)(e).[4/]

NBC has previously advised both the Federal Communications Commission and the Congress that its current practice is to obtain exclusivity against pay cable commencing 60 days before availability and continuing throughout the availability period.[5/]

4/ We recognize that following the list of authorized "examples" Section IV(A) contains the concluding proviso, "so long as any such provision does not violate the antitrust laws." But the import of this proviso is unclear, and the Competitive Impact Statement nowhere explains its meaning. A court in a subsequent private antitrust action might adopt the view that the proviso applied only to those "examples" of contractual provisions which are not the subject of detailed regulation in other sections of the decree. Thus, as to subjects -- like exclusivity against pay cable -- which are addressed in detail in other sections, the court could reason that the Department had fully examined the particular subject and made a determination as to the relief appropriate in accord with the Department's view of the requirements of the antitrust laws.

5/ See FCC Docket No. 20402, Comments of National Broadcasting Company, Inc., at 2 (December, 1975); Testimony of Robert T. Howard, President, NBC Television Network. Hearings on the Pay Cable Television Industry Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary. 94th Cong., 1st Sess., at 222 (July 8, 1975).

Thus, the only change under the proposed decree would be that exclusivity prior to the availability period would be reduced from 60 days to 30. Added to a 24-month availability period, this means that 1/26th of the period of exclusivity (and even less on longer contracts) is removed!

In addition to approving explicitly NBC's current practices, the proposed decree permits NBC to obtain exclusivity on every film which it licenses and places no limitation on the length of the network's availability period. The only prerequisite to obtaining exclusivity throughout an availability period longer than 24 months is that NBC acquire the right to exhibit the film twice during the initial 24-month period and once every 12 months thereafter.

The broad exclusivity approved by the proposed decree may be illustrated by the following examples: If a film license providing exclusivity against pay cable granted NBC the right to telecast a film three times between January 1, 1977 and January 1, 1980, the entire pay cable industry would be barred from exhibiting the film at any time during the 37-month period commencing December 1, 1976 (thirty days before the network's availability date) and ending on January 1, 1980 (assuming NBC telecast the film for the third time

on that date).[6/]

In the example given, the prohibition on pay cable exhibition would become effective on December 1, 1976, even if NBC elected not to telecast the film for many months and did not telecast it for the first time until 1978.

Or, to take another example, exclusivity would bar pay cable exhibition at any time between network telecasts regardless of the number of months intervening between network showings. Thus, even if NBC held the film for 23 months between the first and second showings, pay cable exhibition would be barred during the entire lengthy period before the second showing.

The use of the artificial "availability" period -- which is based on tax, accounting and other considerations -- as the measure of exclusivity presents these irrational consequences because it is an irrational measure of exclusivity. This long and continuous blackout of pay cable throughout the network's availability period stands in marked contrast to the limited exclusivity based on exhibition dates originally proposed by the Department of Justice in its negotiations with NBC. To take the foregoing example, the provisions of the decree permit more than 1,100 days of continuing exclusivity during which pay cable would be denied access to films licensed by NBC. Under an "exhibition date" approach, on the other hand, pay cable would be prevented from exhibiting films only during brief periods immediately proximate to network telecasts. As discussed below, limited 15-day exclusivity prior to network exhibition dates would not be opposed by our clients because the networks would then no longer be in a position to deny pay cable access to feature films for years at a time.

The restraint permitted by the decree cannot be justified. Such unduly long exclusivity is unsupported by any legitimate business need of the network and has been employed to deny pay cable access to feature films and thereby directly to obstruct pay cable's entry into competition. As demonstrated below, the exclusivity sanctioned by the proposed decree is an unreasonable restraint of trade violative of the antitrust laws.

6/ This is so whether or not the networks actually show the film at all. The language in Section VI(E)(iii)(e) does not require that NBC telecast films the specified number of times, but only that it acquire the right to do so. Thus, NBC will remain free to continue to deny pay cable access to feature films for long periods without telecasting the films. The Department's assertion to the contrary in the Competitive Impact Statement is inaccurate. (Competitive Impact Statement, at 20). Where NBC telecasts the film licensed, we understand that the proposed decree is understood, at least by the Department, as meaning that the period of exclusivity terminates at the time of the network's final exhibition of the film under the license. Thus, if the third telecast by NBC in the example cited were to occur on December 1, 1979, the period of exclusivity would be 36 months rather than 37.

IV. ARGUMENT

A. The Department of Justice Should Withdraw Its Consent Because the Exclusivity Approved by the Proposed Decree Constitutes an Unreasonable Restraint of Trade Violative of the Antitrust Laws.

1. Exclusivity stifles the pay cable industry, denies consumers programming choices, and deprives producers of access to pay cable purchasers.

The anticompetitive nature of network exclusivity requires little elaboration. By denying pay cable access to feature films, the networks maintain their dominance over home television at the expense of the pay cable industry, the public, and producers of motion pictures.

There can be no debate as to the impact of exclusivity upon the pay cable industry. The effect is clear, direct and immediate -- pay cable is denied films under network license during their entire period of availability to the network. Since the entrenched networks can outbid pay cable for the finest feature films, exclusivity relegates pay cable to a secondary position as an entertainment medium. Exclusivity, therefore, directly aids the networks in maintaining their oligopolistic hold on home television.

The burdens imposed on the pay cable industry by such restrictions are already evident. The industry has obtained only brief access to many films and no access at all to many others. The result has been to make it more difficult for pay cable to attract new subscribers and to deny the cable industry the revenues it needs to develop as a major broadband medium.

The adverse effect of exclusivity upon the public is also plain. Throughout the network's availability period, the public is totally foreclosed from exercising its choice as to when and in what form it will view feature films on home television. For those pay cable subscribers who find the network's exhibition date inconvenient or prefer to view a film in its original, unedited form and without commercial interruption, exclusivity is a complete denial of consumer choice. The public is limited to viewing the film at the time and under the conditions dictated by the networks. Thus, exclusivity binds the public to the networks and once again directly reinforces the networks' dominant position.

Exclusivity secured through abuse of network purchasing power similarly denies marketing choices to motion picture distributors. In order to license films to the networks, distributors are required to grant exclusivity and to forego the opportunity of licensing to pay cable during the period of network availability. Consequently, the policies of the antitrust laws are frustrated as distributors are forced to capitulate to the networks' unwarranted and anticompetitive demands.

2. Exclusivity is a restraint of trade, subject to the "Rule of Reason."

As the courts have long recognized, an exclusive dealing contract is a restraint of trade which is subject to the "Rule of Reason." The leading case is United States v. Paramount Pictures, Inc., 334 U.S. 131, 144-48 (1948).

The Paramount case involved, among other things, "clearances" granted to first-run theatres which provided that the licensor would not license films to second-run, lower-priced theatres within a given area for a period of weeks after the first-run exhibition had concluded. The District Court recognized that such provisions restrained trade, but refused to condemn all such clearances as per se violations of the antitrust laws. 66 F. Supp. 323, 341 (S.D.N.Y. 1946). Rather, the court held that the proper inquiry was whether under all the attendant circumstances the particular clearance was reasonable. Id. at 343. Applying this test, the court found many of the clearances granted could not be justified.[7/]

The Supreme Court approved the District Court's analysis. 334 U.S. at 144-48. The Court emphasized that "many clearances had no relation to the competitive factors which alone could justify them" and "had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade." 334 U.S. at 146. Moreover the Court imposed the burden of justifying future clearances on the producers -- the parties "in the best position to evaluate their competitive effects." 334 U.S. at 148.

Under the "Rule of Reason," it is well-established that there must be a detailed analysis of the challenged restraint in light of all pertinent industry conditions. The classic statement of the many factors to be considered is that of Justice Brandeis in Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918):

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

As demonstrated below, the broad exclusivity against pay cable approved by the proposed decree

7/ The court also found a conspiracy among the producers to grant unreasonable clearances. 66 F. Supp. at 343-46.

bears each of the indicia which have led courts to declare "exclusives" unreasonable. Accordingly, the Department should withdraw its consent to the proposed decree.

3. Neither the Department nor NBC has provided evidence supporting the reasonableness of the exclusivity approved by the decree.

Tellingly, neither the Department nor NBC refers to any evidence which would support the reasonableness of the exclusivity approved by the proposed decree. To the contrary, according to the Competitive Impact Statement, the Department determined during pretrial discovery that network exclusivity against pay cable "should be curtailed" and initially proposed that "NBC be permitted such exclusivity for only 45 days before and after each network exhibition date of a feature film, . . ." (Competitive Impact Statement, at 19). Presumably, this proposal reflected the Department's view of the limits on exclusivity which would serve the public interest.

It is clear that NBC rejected this proposal and pressed the Department for approval of the network's existing practices. The proposed decree demonstrates that the Department yielded to NBC's demands.

The Department defends its concession by stating that the proposed decree merely establishes "outer limits" on exclusivity. (Competitive Impact Statement, at 20.) But the decree expressly approves exclusivity up to such "outer limits," and the Department has provided no evidence to support the reasonableness of exclusivity up to those limits. Indeed, the Department states that there were "no materials or documents which the Government considered determinative in formulating the proposed consent judgment." (Competitive Impact Statement, at 21.) It appears, therefore, that the Department merely acceded to NBC's negotiating demands in the context of a broad-ranging case and has no basis upon which to conclude that the exclusivity approved is reasonable.

The proposed decree purports to resolve an issue presented under the "Rule of Reason" in the absence of a record and indeed in the absence of any evidence indicating that the exclusivity approved is reasonable. On this ground alone, the Department should withdraw its consent to the proposed decree.

4. The exclusivity approved by the proposed decree is unreasonable on several independent grounds.

The exclusivity provided for here is unreasonable because (a) it is unnecessary to permit the networks to enjoy the rights conveyed by the license; (b) such exclusivity will become an industry-wide standard imposing a substantial barrier to entry by pay cable; (c) the networks are permitted to obtain exclusivity on every available film so as to foreclose pay cable from the market; and (d) it is prima facie unreasonable to suppose that the networks as a free medium

need exclusivity against a fee-charging medium like pay cable. We emphasize that exclusivity bearing any one of these characteristics would be subject to condemnation as unreasonable. In this case, all of these objectionable features are present, and the conclusion is inescapable that the exclusivity approved by the decree is itself a violation of the antitrust laws.

(a) The exclusivity approved is unnecessary to permit the networks to enjoy the rights conveyed by the license.

In Paramount, supra, the Court indicated that one of the factors bearing on the reasonableness of exclusivity is whether the clearance is "reasonably necessary to protect the licensee in the run granted." 334 U.S. at 147. If such protection is unnecessary, the restraint of trade is unreasonable and in violation of the antitrust laws.

The networks have attempted to defend exclusivity against pay cable as necessary to protect network telecasts. They assert that pay cable exhibition must be prevented during the entire period of network availability to assure that network telecasts are not impaired by pay cable exhibitions.

The contention ignores reality. Pay cable subscribers number little more than 1% of the homes served by the networks. Plainly, the more than 75,000,000 homes without pay cable cannot be diverted to pay cable. Moreover, the networks have provided no evidence (and we know of none) to suggest that pay cable subscribers who have seen a popular film months previously will not enjoy the film again when it is shown on network television or will not encourage their relatives, friends, and associates to view the network showing. Significantly, the networks have not been reluctant to obtain licenses on films previously shown on pay cable. Indeed, in many instances, the network has telecast such films only a few months after the pay cable exhibition. There is no evidence that any of these telecasts was adversely affected by the prior pay cable showing.

Indeed, the available evidence is to the contrary. In June 1976, "Gone With The Wind" was shown on pay cable TV. Nearly eighty percent of all pay cable subscribers viewed the film. In November 1976, the film appeared on network television and obtained the highest Nielsen rating then ever recorded. While "Gone With The Wind" is a unique film, this is not an isolated example. In each of the instances shown in Attachment B covering a recent two-month period, pay cable exhibition had preceded the network telecast. Yet, the networks included these films in their programming, and there is no evidence that the network telecast was adversely affected by the prior pay cable showing.

The fact is that the networks seek to license films which have been most widely seen during their theatrical showings. Experience has shown that films viewed by the greatest number of persons in theatres typically in turn attract the largest television audiences. Similarly, prior pay cable exhibition promises

to increase network audiences by giving films additional exposure prior to network showing. As noted, the networks have adduced no evidence whatsoever that prior pay cable exhibitions adversely affect network telecasts.[8/] One could construct a more convincing argument to the exact contrary.

Exclusivity against pay cable serves no legitimate network purpose. The networks do not require exclusivity against pay cable to protect their interests in films licensed. Accordingly, without regard to the additional indicia of unreasonableness present here, the exclusivity approved by the decree is unreasonable and itself a violation of the Sherman Act.

(b) The proposed decree unreasonably approves an industry-wide practice of exclusives on films licensed by the networks and thereby preserves a substantial barrier to entry by pay cable

The exclusivity approved by the proposed decree is subject to further condemnation because it will become the industry-wide standard applicable to films licensed by each of the oligopolistic networks. The other networks follow parallel practices to those of NBC, and the proposal of the Department is to enter into similar decrees with the other two networks which would approve those practices. Thus, under the decree, the networks would have the Department's acquiescence for the first time in their efforts to deny pay cable access to films and to destroy the pay cable industry.[9/]

The Supreme Court has recognized that exclusives are particularly suspect when they reflect a pervasive industry practice which results in erecting substantial barriers to entry by smaller firms. In Standard Oil Co. v. United States, 337 U.S. 293 (1949), defendant Standard Oil entered contracts with independent dealers

8/ In a submission to the Federal Communications Commission on the issue of exclusivity, NBC has acknowledged that it has no evidence that the networks require the protection of exclusivity against pay cable:

> "It is difficult to measure with precision what the impact on the network would be if no exclusivity were obtained against competing pay cable uses of a film during the period that it is available for network use." FCC Docket No. 20402, Comments of National Broadcasting Company, Inc., at 10 (December 1, 1975).

9/ The trade press has made an exact and realistic appreciation of what the proposed consent decree does in this respect. An article in Variety dated November 24, 1976, entitled "NBC Discovers That Justice Is Blind, Gave Uncle Sam Its 11th Toe In Decree," recognizes that:

> "[t]he provision also establishes Governmental approval of exclusivity against pay cable both in concept and time, something that feevee entrepreneurs would prefer to avoid. The terms are comfortable enough for NBC -- Justice had initially proposed that exclusivity last only 45 days before and after each network exhibition of a film -- and approval of the agreement by L.A. District Court Judge Robert Kelleher could have the practical effect of etching them in stone in D.C."

in petroleum products under which each dealer agreed to purchase all of its requirements in particular products from Standard. Similar exclusive contracts were employed on a widespread basis by competing oil companies. As a result of the contracts, new entrants were restrained in their ability to compete because there were few dealers whose needs were not satisfied by the established oil companies. In holding the exclusives violative of Section 3 of the Clayton Act, the Court emphasized the barriers to entry by additional firms. According to the Court, the exclusive contracts "prevent a late arrival from wresting away more than an insignificant portion of the market." 337 U.S. at 309.

In the instant case, the networks are employing their power as dominant purchasers to impede pay cable competition just as in Standard Oil the offending oil companies used their position as sellers of petroleum products to impose unreasonable restraints. The use of both types of economic power to erect barriers to entry, of course, is equally proscribed. Indeed, the Supreme Court has repeatedly held in cases involving the motion picture industry that the use of dominant purchasing power to exclude competition violates the Sherman Act. United States v. Griffith, 334 U.S. 100 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

Also instructive is the Supreme Court's decision in FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953), where four distributors of advertising films had long-term exclusive contracts with 75% of the theatres in the United States displaying such films. The Federal Trade Commission found that the exclusive contracts unreasonably restrained the ability of other film suppliers to compete. The Supreme Court agreed, holding that "a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition.'" 344 U.S. at 395.

By seeking to establish an industry-wide standard of exclusivity,[10/] the proposed decree preserves the substantial barriers to entry imposed by the networks against pay cable. We submit that there is no justification for the Department's willingness to aid the networks' efforts to cement their cartelization.

(c) The proposed decree would unreasonably permit NBC and the other networks to obtain exclusivity on all available feature films.

In addition to the industry-wide character of the proposed decree, the exclusivity approved is unreasonable

10/ If the government does not obtain a similar provision on exclusivity in its suits against CBS and ABC, NBC is entitled to apply to the Court under Section IX for such modification as is necessary to avoid NBC being placed at a competitive disadvantage.

for yet another reason -- because pay cable could be completely foreclosed from feature films consistent with the terms of the decree. As noted previously, the decree approves NBC's obtaining exclusivity against pay cable on each and every motion picture. The other networks presumably would receive similar license. Thus, the decree would permit the networks to obtain exclusivity on all available feature films. In analogous circumstances, the use of exclusive contracts by dominant firms to foreclose potential competition has been condemned as unlawful. Cf. United States v. Pullman Co., 50 F. Supp. 123 (E.D. Pa. 1943), 64 F. Supp. 108 (E.D. Pa. 1946), aff'd, 330 U.S. 806 (1947).

(d) It is prima facie unreasonable to suppose that the networks as a free medium need exclusivity against pay-cable.

As noted previously, many of the "clearances" involved in Paramount were held unlawful because they were unduly broad and unnecessary to protect the first-run theatres. Reasonable, limited clearances of a few days or weeks, however, were upheld because the Court recognized that the public might refrain from patronizing the first-run theatres and await the second-run, lower-priced exhibitions.

That facet of the Paramount decision is inapplicable here. In the instant case, the positions of the parties are reversed -- the lower-priced exhibitors (the networks) seek protection not for days or weeks but for years against the higher-priced exhibitors (pay cable). The exclusivity approved by the decree, therefore, is patently unreasonable.

5. The exclusivity approved against pay cable is irrational and discriminatory when compared to the flat prohibitions in the decree on exclusivity against other forms of exhibition.

In contrast to their preoccupation with denying films to pay cable, the networks seek no exclusivity against in-flight exhibitions, hotel and other non-residential exhibition, theatrical and nontheatrical projection, and video discs, cartridges, and cassettes. The proposed decree preserves these distinctions by prohibiting any exclusivity as the latter forms of exhibition while expressly approving exclusivity against pay cable.

There is no basis other than predation for the networks' decision to single out pay cable. To take one of the other industries, the video disc-cartridge-cassette industry is quite similar to pay cable. Each is in an early stage of development; each serves only a minute portion of the public; and each permits home viewing of feature films in unedited form and without

commercial interruption.[11/] Indeed, in contrast to pay cable exhibitions which are of short duration, video discs, cartridges, and cassettes provide the public with a continuing and permanent opportunity to view feature films shown on network television. If the networks do not require exclusivity against the emerging video disc industry, they surely have no legitimate need for exclusivity against similarly emerging pay cable.

The networks also concede that they do not require exclusivity against theatrical projection, in-flight exhibition, and hotel and other nonresidential closed-circuit television. However, if seeing a feature film on pay cable TV will destroy a consumer as a potential viewer of the film and its accompanying commercials on network TV, it is hard to grasp why seeing it in a theatre or a 747 will not.

The proposed decree would approve NBC's invidious, anticompetitive discrimination against pay cable. The distinctions drawn are completely indefensible. They are eloquent in disclosing the pay cable TV industry as the target of NBC. Accordingly, the Department should withdraw its consent to the proposed decree.

11/ Of course, NBC has an additional reason not to seek exclusivity against discs or cartridges. As is well-known, its parent company has substantial economic interests in those products. We understand that CBS also has invested in those products.

6. Unwarranted network demands for exclusivity violate free market principles.

The networks have asserted in the past that the granting or withholding of exclusivity should remain subject to negotiation with producers. The suggestion made is that producers should retain the freedom to bargain with the networks and to sell exclusivity if they so desire in accord with their appraisal of market conditions.

This argument has validity only where the market power of buyer and seller is relatively equal. For only then can true marketplace bargaining occur. Such a market will generally be found where there are a large number of competing buyers and competing sellers. Here, however, the dominant position of the three networks is incontrovertible. Indeed, the instant government suits proceed from the premise that the networks possess dominant purchasing power to which program suppliers have been forced to submit. Thus, it is plain that the networks are in a position to demand unreasonable exclusivity against pay cable from producers of feature

films, and the evidence shows that they do so.[12/]

Moreover, the willingness of the networks to pay large sums to obtain unwarranted exclusivity against pay cable, and the complementary desire of producers to earn large license fees from the networks, does not excuse the restraint. The networks and the motion picture producers are entitled under the antitrust laws to bargain only for reasonable exclusivity. In short, the fact that the networks may make it profitable for producers to grant unreasonable exclusivity provides no defense for the networks' anticompetitive conduct. That an unreasonable restraint of trade is viewed by the parties as being in their economic interest does not excuse it. Unless the product of physical coercion, every contract in restraint of trade, reasonable or unreasonable, has a consensual basis.

B. The FCC Rules Restricting Pay Cable's Access to Feature Films and the Diminished Supply of Quality Films Aggravate the Impact of Exclusivity and Further Demonstrate the Evils of the Proposed Decree.

In the past, the networks have sought to justify exclusivity against pay cable by asserting that films other than those under network contract are available for pay cable exhibition. Even were this true, it would provide the networks no defense for their conduct. The networks are not entitled to obtain unnecessary and unreasonable exclusivity whether or not other films are available to pay cable. Neither should the pay cable TV industry be forced to glean the fields after the networks' harvest in order to find appropriate fare to present to its subscribers.

Moreover, the alleged availability of other films cannot justify the proposed decree. As noted, the proposed decree is not limited to any particular number of feature films. It expressly approves NBC's obtaining an exclusive on as many feature films as it can get. The chance that NBC (and the other networks when their turns come) may not exercise its privileges under the decree to their utmost hardly justifies the provision.

Further, the pay cable industry faces significant limitations on its access to films. As noted previously, there is a sharply diminished supply of new films. In addition, as the Department is aware, the Federal Communications Commission has imposed stringent restrictions on pay cable's access to feature films.[13/]

12/ See, e.g., Testimony of Herbert Stern, Vice President of Universal Studios-MCA, Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., at 97 (May 22, 1975) ("There are only three networks to sell to. If you don't sell to one of them you have no place to go.")

13/ The FCC rules are under challenge in the United States Court of Appeals for the District of Columbia

[Footnote continued on following page]

The FCC rules divide films into three categories according to the number of years following general theatrical release. Under the rules, pay cable may exhibit films during the first three years following release. 47 C.F.R. § 76.225(a)(1)(i). But many of the most popular films in this period are denied to pay cable completely or made available only for a brief period because of long theatrical runs and network exclusivity.

Theatrical runs limit the period in which pay cable may be able to obtain feature films, because film suppliers do not offer films to pay cable until theatrical exhibition is complete. For most films, theatrical exhibitions run between 12 and 18 months. In the case of more successful films, the period of theatrical showing may be 24 months. And, in some instances, the true "blockbuster" may be in theatrical showing for more than three years. Thus, the more successful a film's theatrical showing, the shorter the period of pay cable's possible access during the first three years.

Moreover, pay cable is by no means assured of access to films which have completed theatrical exhibition in less than three years. The networks are free to license such films, and they have increasingly done so.[14/] And such licenses invariably provide for exclusivity against pay cable. As a result, the period that such films have been available to pay cable has been sharply limited. Indeed, in many instances, pay cable has been denied access completely.

Attachment C lists 24 examples of films which have been denied to pay cable because of network exclusivity during the initial three-year period in which pay cable is permitted by the FCC rules to bid for feature films. As the chart reflects, most of these films were denied to pay cable more than 12 months before the end of the three-year period; others were denied to pay cable for more than six months during the three-year period.

[Footnote continued from previous page]

Circuit. They are, however, currently in effect and, for purposes of evaluating the impact of the proposed decree, it must be assumed that they will remain in effect. We, of course, believe that the rules are totally invalid for the reasons set forth in the briefs filed by the pay cable industry, the Department of Justice, the motion picture industry, and various public interest organizations in Home Box Office, Inc. v. Federal Communications Commission, No. 75-1280 et al.

14/ NBC's brief before the District of Columbia Circuit cites testimony before the FCC allegedly establishing that half of the films telecast by NBC during the 1972-73 season were under three years old. Home Box Office, Inc. v. Federal Communications Commission, No. 75-1280 et al., Brief of Petitioner National Broadcasting Company, Inc., November 3, 1975, at 25.

Network exclusivity is highly disruptive of pay cable operations as to films in the first three years after theatrical release. In many instances, pay cable companies have scheduled the exhibition of particular films only to be notified by the producer shortly before cablecast date of the license's termination. Whenever this occurs, promotional marketing must be recalled, schedules must be rearranged, and explanations must be made to unhappy subscribers.

Films suddenly withdrawn from pay cable as a result of network exclusivity will not become available to pay cable thereafter. Once the initial three-year period has expired, the films are available to pay cable under the FCC's 3-10 year rule under only one condition -- that the film be under contract and available for exhibition to a network or television station in the market. 47 C.F.R. § 76.225(a)(1)(ii). Because of exclusivity, however, this rule is meaningless and affords pay cable no access to feature films. The rule is a classic Catch-22: films which are not under contract and available to conventional television are forbidden to pay cable under the FCC rule; films which are under contract and available to conventional television are rendered unavailable to pay cable by contractual exclusivity.[15/] The proposed decree would complete the circle by sanctioning that exclusivity!

The end of the ten-year period does not do the pay cable industry much good. Exclusivity continues to bar access to the desirable films, and films not under contract to networks or their affiliates are available to pay cable only if they have not been exhibited on conventional television in the market for three consecutive years. 47 C.F.R. § 76.225(a)(1)(iii). The FCC recognized in its First Report and Order that this provision would generally limit pay cable to films which are "undesirable." 52 F.C.C.2d 1, 54 (1975).

Our basic position is that network exclusivity against pay cable constitutes an unreasonable restraint of trade apart from the FCC restrictions. The situation is bad enough without the FCC restrictions, and clearly, as demonstrated in Sections IV(A)(4) and (5) above, the decree approves an unreasonable restraint of trade even if the FCC rules did not exist. But when the FCC restrictions are also considered, the destructive impact upon pay cable of the networks' practices becomes even

15/ CBS President Arthur R. Taylor acknowledged in testimony before a Congressional subcommittee that the FCC's 3-10 year period is "meaningless" because of exclusivity against pay cable. Hearings on the Pay Cable Industry before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. at 160-61 (July 8, 1975).

more apparent. While we recognize that this is not the appropriate forum in which to complain of the FCC rules, the existence of those rules further demonstrates the need for the Department to withdraw its consent to the proposed decree.

C. The Department Has Consistently Opposed Unwarranted and Protectionist Restrictions on Pay Cable as Adverse to the Public Interest; the Proposed Decree Is an Inexplicable and Unwarranted Departure From This Position.

The proposed decree marks a sharp and inexplicable departure from the Department's past support of the pay cable industry as an emerging medium and the Department's consistent opposition to unwarranted restrictions upon pay cable programming.

Throughout the five-year long proceedings before the Federal Communications Commission leading to the foregoing rules, the Department repeatedly urged the Commission to refrain from imposing unnecessary restrictions on pay cable and to avoid policies which "cripple a new industry . . . because of speculative fears as to possible effects upon established firms."[16/] The Department counselled the Commission that it "should not defer to existing interests or impose excessive burdens on new entrants."[17/] The Department emphasized that "imaginative speculation"[18/] by broadcast interests was wholly insufficient to warrant restrictions on pay cable's access to feature films and other programs.

Notwithstanding the arguments of the Department, the pay cable industry, the motion picture industry, and numerous public interest organizations, the Commission followed a protectionist path in its April 1975 First Report and Order[19/] and sharply limited pay cable's access to feature films. The pay cable industry and various public interest groups have challenged those rules in the United States Court of Appeals for the District of Columbia Circuit. Home Box Office, Inc. v. Federal Communications Commission, No. 75-1280, et al. The case is still pending.

The Department has filed a brief in the Court of Appeals fully supporting pay cable's position and urging that all of the FCC restrictions be invalidated. The Department reasserted with vigor its earlier

16/ Comments of the Department of Justice, FCC Docket No. 19554, November 1, 1972, at 11. (Emphasis in original.)

17/ Id. at 41.

18/ Reply Comments of the United States Department of Justice, FCC Docket No. 19554, October 4, 1974, at 3.

19/ 52 F.C.C.2d 1 (1975).

arguments that the imposition of unnecessary restrictions upon pay cable is not in the public interest. The Department noted that the Commission was without authority "to favor one form of interstate communications over another"[20/] and observed, in language equally pertinent here, that decisions concerning the development of new technology, like pay cable TV, "are too important to be based upon surmise, conjecture or concern for the profit margins of those that provide the existing service."[21/] The Department noted that the FCC and the courts had recognized the "oligopolistic"[22/] nature of the networks. The Department's view was that the networks had failed to establish any need for restrictions on pay cable programming.

The proposed consent decree cannot be squared with the Department's long-standing position.[23/] The exclusivity approved by the decree, like the FCC rules, is not supported by any legitimate need of the networks or the public; rather such exclusivity rests upon the "speculative fears" of established interests and "surmise, conjecture or concern for the [networks'] profit margins." Moreover, exclusivity threatens to "cripple a new industry" by "impos[ing] excessive burdens" on pay cable entrants.

The Department should withdraw its consent to the unwarranted restrictions in the proposed decree. To stand by the present provisions would make the Department a party to precisely the kind of protectionism that it has consistently opposed in the past.

CONCLUSION

The Department Should Withdraw Its Consent to the Proposed Decree and Negotiate Adequate Relief With NBC. A Provision Limiting Exclusivity Against Pay Cable to a Period Not in Excess of 15 Days Before Network Telecasts Would Not Be Subject to Further Objection By Our Clients. If NBC Is Unwilling To Consent to Such a Provision, the Department Should Continue Litigation Against NBC and the Other Networks in Order to Enjoin the Networks' Predatory Use of Exclusivity Against the Pay Cable Industry.

20/ Home Box Office, Inc. v. FCC, No. 75-1280 et al., Brief for Respondent United States of America, at 29 (February 1976).

21/ Id. at 35.

22/ Id. at 13 n. 8.

23/ The Department has not explained its dramatic change of position. Thus, the Department has failed to heed the well-established rule recognized by the courts:

> "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned

[Footnote continued on next page]

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> analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

See also National Association of Food Chains, Inc. v. ICC, 535 F.2d 1308, 1314 (D.C. Cir. 1976).

For the reasons stated, we believe that no network exclusivity against pay cable exhibition has been or can be justified and that the exclusivity approved by the proposed decree constitutes an unreasonable restraint of trade. The Department, therefore, should withdraw its consent to the proposed decree.

We understand, however, that it may be said that there is a public interest to be served in the settlement of protracted litigation and in obtaining relief against other types of anticompetitive activity by the networks.[24/] Accordingly, the Department might wish to accept a provision permitting a more limited exclusivity in the context of an overall settlement of this litigation.

If it were proposed, we would not object to inclusion in the proposed decree of a provision limiting exclusivity against pay cable to the 15-day period preceding each network exhibition of a feature film (and providing none after such exhibition). Such an approach would be vastly superior to that in the proposed decree and would afford substantial relief against the networks' present anticompetitive practices. Under an "exhibition date" approach, films would no longer be denied to pay cable for years at a time. Instead, the general rule would provide for the availability of films to pay cable. Thus, the networks would no longer be in a position to use exclusivity as a means of suppressing pay cable competition. Conversely, a 15-day provision would more than adequately protect the networks.

We believe that, short of the total prohibition of exclusivity against pay cable which we trust litigation would bring, exclusivity for a limited (i.e. 15 day) period prior to each exhibition date is the only proper basis for a negotiated settlement if the Department is unwilling to press for a total prohibition on exclusivity. The approach recommended is feasible because the networks would remain free to negotiate the availability periods they desire for planning and other purposes and could schedule telecasts of feature films 15 days in advance during such availability periods without sacrificing flexibility. While pay cable would not be treated on a par with video discs, in-flight exhibitions, hotel showings, and the other industries fully protected by the decree, the approach would promote the public interest by eliminating the most aggravated network abuses of the past. Accordingly, we believe this proposal might be a viable resolution tempering the imperative of

24/ We take no position on the adequacy of other provisions in the proposed decree.

obtaining adequate antitrust relief to some extent with the interests in effectively utilizing resources and terminating protracted litigation.

We urge, moreover, that if appropriate relief is not obtained through consent in the instant litigation, the Department should continue litigation against NBC and the other networks to enjoin their continued use of exclusivity as a means of suppressing pay cable competition. The violation of law is flagrant; the impact upon the struggling pay cable industry is clear; and the continued dedication of Antitrust Division resources in pursuit of meaningful relief is fully warranted.

As to the Division's resources, we note that neither FCC nor Congressional action with respect to exclusivity can be assured. The FCC's Notice of Inquiry into network exclusivity, FCC Docket No. 20402, has remained dormant at the Commission for nearly two years without any indication that the Commission intends to issue a Notice of Rulemaking.[25/] In addition, although hearings have been held by subcommittees in both the Senate[26/] and House of Representatives[27/] concerning network exclusivity, no proposed legislation has been introduced. Accordingly, there can be no assurance of government relief unless the Department of Justice performs its function. Moreover, if the Department adheres to the proposed decree and puts its imprimatur on the networks' practices, the likelihood of Congressional or agency action will be virtually non-existent.

The issues posed by the proposed decree are far-reaching and raise important considerations concerning the public interest. Sensitive First Amendment considerations are implicated, and the future of a new and developing technology with vast potential for promoting consumer choice is at stake. In addition, there is presented a classic abuse of economic power by oligopolists to suppress competition and stifle diversity. The Department must carefully weigh all of these factors in reaching its decision.

To sum up the position of our clients: We believe it is clear that no network exclusivity against pay cable on feature films is warranted and that exclusivity has been employed by the networks to suppress potential competition by a new entrant and

25/ In comments to the FCC, NBC has questioned the authority of the Commission to impose restrictions on network exclusivity against pay cable. FCC Docket No. 20402, Comments of National Broadcasting Company, Inc., at 6-7 (December 1, 1975).

26/ Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., May 21, May 22, July 8, and July 15, 1975.

27/ Hearings before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Representatives, 94th Cong., 2d Sess., July 27, 1976.

to deprive viewers of freedom of choice. The proposed decree would expressly approve the continuation of such abuses and must, therefore, be rejected as inconsistent with the public interest. We submit that as a matter of antitrust law, no exclusivity against pay cable can be justified under the rule of reason. However, as a settlement of this litigation, a limitation on exclusivity solely to a period of 15 days before each network exhibition would not be objected to by our clients. If such a limit cannot be made the basis of a stipulated judgment, the Department should continue litigation against NBC and the other networks to obtain meaningful relief against the networks' unlawful use of exclusivity to suppress pay cable competition.

Respectfully submitted,

By

Dennis G. Lyons
Leonard H. Becker
Steven P. Lockman
Albert H. Kramer

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Dated: February 25, 1977

ATTACHMENT A

PAY CABLE COMPANIES PARTICIPATING IN THE ACCOMPANYING JOINT COMMENTS

American Television & Communications Corp.
360 South Monroe Street
Denver, Colorado 80209

Cablecom-General, Inc.
4705 East Kingston Street
Denver, Colorado 80239

Cable Information Systems, Inc.
230 Park Avenue
New York, New York 20017

Central California Communications
Post Office Box 1651
238 John Street
Salinas, California 93901

Communications Properties, Inc.
910 City National Bank Building
Austin, Texas 78701

Continental Cablevision, Inc.
54 Lewis Wharf
Boston, Massachusetts 02110

Cox Cable Communications
53 Perimeter Center East
Atlanta, Georgia 30346

Daniels Properties, Inc.
2930 East 3rd Avenue
Denver, Colorado 80206

Good-Vue CATV, Inc.
210 West Nyack Road
West Nyack, New York 10994

Harris Cable Corporation
10889 Wilshire Boulevard
Los Angeles, California 90024

Heritage Communications, Inc.
2205 Ingersoll Street
Des Moines, Iowa 50312

Home Box Office, Inc.
Time & Life Building
Rockefeller Center
New York, New York 10020

Inertia, Inc.
3961 MacArthur Boulevard
Newport Beach, California 92660

Liberty Communications
225 Coburg Road
Eugene, Oregon 97401

Manhattan Cable Television
120 E. 23rd Street
New York, New York 10010

Midwest Video
1255 Tower Building
Little Rock, Arkansas 72201

Sammons Communications, Inc.
Box 5728
Dallas, Texas 75222

Tele-Communications, Inc.
54 Denver Technological Center
Denver, Colorado 80210

Telesis Corporation
2605 Yeager Road
Post Office Box 18
Lafayette, Indiana 47902

Teleprompter Corporation
50 West 44th Street
New York, New York 10036

The TM Communications Company
3303 Harbor Boulevard
Post Office Box 2320
Costa Mesa, California 92626

UA Columbia Cablevision, Inc.
49 Riverside Avenue
Westport, Connecticut 06880

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United Cable Television Corporation
522 S. Boston Avenue
Post Office Box 3423
Tulsa, Oklahoma 74101

Vision Cable Communications, Inc.
501 Madison Avenue
New York, New York 10036

Attachment C

EXAMPLES OF FEATURE FILMS DENIED TO PAY CABLE
DURING 3 YEAR PERIOD FOLLOWING THEATRICAL RELEASE

Title	Conclusion of 3 Year Period Following Theatrical Release	Date Denied to Pay Cable	Time Lost to Pay Cable During 3 Year Period Following Theatrical Release
Lost Horizon	3/76	2/75	13 months
Thunderbolt & Lightfoot	5/77	8/31/75	20 months
Thieves Like Us	2/77	9/1/75	17 months
Neptune Factor (Neptune Disaster)	5/76	2/28/75	14 months
Legend of Hell House	6/76	2/28/75	15 months
Paper Chase	10/76	2/28/75	19 months
Scarecrow	4/76	10/31/75	5 months
The Sting	12/76	9/75	15 months
40 Carats	7/76	9/1/75	11 months
Newman's Law	5/77	10/75	19 months
Effect of Gamma Rays on Man in the Moon Marigolds	1/76	2/28/75	11 months
Paper Moon	5/76	2/16/76	2 months
The Spike's Gang	4/77	9/1/75	19 months
The Long Goodbye	3/76	9/1/75	7 months
The Last of Shiela	6/76	8/75	10 months
Last American Hero (Hard Driver)	7/76	2/28/75	16 months
Emperor of the North	6/76	6/30/75	11 months
Conrack	3/77	4/30/75	23 months
Lovin' Molly	3/77	7/31/75	20 months
California Split	8/77	7/31/75	25 months
Tom Sawyer	6/76	3/31/75	14 months
Claudine	4/77	2/29/76	14 months
The Seven Ups	12/76	6/30/75	18 months
Billy Two Hats	3/77	2/29/76	13 months

Attachment B

EXAMPLES OF RECENT NETWORK TELECASTS
OF FEATURE FILMS PREVIOUSLY SHOWN ON PAY CABLE

		Network Telecast Date
Airport 1975	NBC	9/20/76
Magnum Force	CBS	9/24/76
Earthquake (Part 1)	NBC	9/26/76
Paper Moon	CBS	10/1/76
Breakout	NBC	10/2/76
The Way We Were	ABC	10/3/76
Never Give An Inch (Sometimes a Great Notion)	NBC	10/4/76
Brannigan	CBS	10/8/76
Jesus Christ Superstar	NBC	10/11/76
The Stepford Wives	ABC	10/24/76
Badlands	CBS	10/29/76
McQ	NBC	10/30/76
Live and Let Die	ABC	10/31/76
Juggernaut	CBS	11/3/76
Play It Again, Sam	CBS	11/5/76
The Day of the Dolphin	NBC	11/6/75
Gone With the Wind (Part 1)	NBC	11/7/76
Gone With the Wind (Part 2)	NBC	11/8/76
The Great Waldo Pepper	NBC	11/10/76
Death Wish	CBS	11/10/76
Macon County Line	NBC	11/13/76
Chinatown	CBS	11/17/76

JAMES O. EASTLAND, MISS., CHAIRMAN
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Mr Hallander 3706
Mr Kaplan
Mr Sullivan
Mr Kelley
Mr Kelley

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CHIEF COUNSEL AND STAFF DIRECTOR

United States Senate

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
(PURSUANT TO SEC. 5, S. RES. 175, 94TH CONGRESS)
WASHINGTON, D.C. 20510

February 25, 1977

RECEIVED
MAR 2 1977
O.L.A.

Donald I. Baker, Esquire
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Baker:

I am writing this letter and enclosing a memorandum from the staff of the Antitrust and Monopoly Subcommittee pursuant to the Antitrust Procedures and Penalties Act as comments relating to the proposed consent judgment entered against National Broadcasting Company, Inc. in United States v. National Broadcasting Company, (Civil Action No. 74-3601-RJK (C.D.Cal.).

The provision which concerns me is subsection VI(E)(iii)(e), which sanctions NBC's acquisition of exclusive exhibition rights to feature films against pay cable television for a 24-month period for two exhibitions, and for 12 additional months for each additional exhibition. In addition, NBC would be entitled to demand exclusivity for 30 days prior to this 24-month period. I have reviewed the staff memorandum, which incorporates the extensive hearings held on this issue by the subcommittee, and I am convinced that the department should give serious consideration to deleting this provision in the decree.

While there may indeed be situations, now or in the future, in which exclusivity provisions would be justified as reasonably necessary to a broadcasting network, I do not think it necessary or wise, at this time, virtually to insulate an unlimited number of two-year exclusivity provisions from the operation of the antitrust laws. FCC rules that already restrict access to movies

OFFICE OF LEGISLATIVE AFFAIRS
ANTITRUST

by the pay cable industry are, of course, still in existence. The combination of these restrictive rules, which in the past the department has attacked in testimony before this subcommittee, and the decree's approval of lengthy exclusivity provisions, could enable networks contractually to exclude pay cable from meaningful access to feature movies. It seems to me wholly inappropriate for a major policy decision of this potential impact to be decided without a complete record and in the context of a non-litigated consent decree with one network.

Sincerely,

Edward M. Kennedy
Acting Chairman

enclosure

MEMORANDUM

TO: Edward M. Kennedy

FROM: Majority Staff, Senate Antitrust and Monopoly Subcommittee

SUBJECT: Subsection VI(E)(iii)(e) of the NBC Consent Decree

On December 10, 1974, the United States filed identical complaints against the three networks alleging that the networks had each combined with their affiliated stations to use their control over access to network air time to restrain and monopolize prime time TV entertainment programming in violation of sections 1 and 2 of the Sherman Act. The complaints charged that each network used their control over access: to exclude from network broadcast those entertainment programs in which the networks had no financial interest; to compel independent program suppliers to grant to the networks financial interest in TV programs which they accepted for broadcast; to refuse to sell air time to advertisers and other independent program suppliers seeking to have their own programs shown on the networks; to control the prices paid by the networks for TV exhibition rights to motion picture films; and to obtain competitive advantages over other producers and distributors of TV and entertainment programs and of motion picture feature films. The government sought to enjoin the networks from the following practices: obtaining any interest, except for the right of network exhibition, in independently produced programs; producing entertainment programs themselves; and using their control over access to the networks to foreclose competition or obtaining an unfair competitive advantage in any other field.

On November 17, 1976, the Department of Justice and NBC filed a proposed consent decree to terminate this litigation. Most of the terms of the decree are contingent upon settlement on similar terms with CBS and ABC. While there are many troublesome aspects of the decree, one provision is markedly both adverse to the antitrust laws and the public interest. The provision in question, Subsection VI(E)(iii)(e), concerns the amount of exclusivity against pay cable NBC would be allowed to obtain when purchasing the rights to televise motion pictures.

The consent decree would permit NBC to contract with movie producers for exclusivity against pay cable for 24 months if NBC broadcast a movie twice, and an additional 12 months for each additional time NBC broadcast the film. In addition, NBC would be allowed to demand a provision banning the license of the film to pay cable for a period of 30 days prior to the time NBC could telecast the film.

To fully understand the effect of the exclusivity allowed by the consent decree, one must take into account certain FCC Rules. Feature films are first marketed through theaters, usually through a distribution system owned by the movie producer. The FCC Rules allow pay cable to bid for these films for a period of three years after their first release. Many films, however, especially the more successful films, are marketed through theaters for up to two years after their release and movie producers are unwilling to license a film to pay cable in this period. The FCC Rules, however, do not prohibit networks from obtaining exclusivity rights within this three-year period, and the networks usually obtain exclusivity well within this period. 1/ From the end of the third year until the end of the tenth year after release, the FCC Rules prohibit pay cable access to the film unless the film is under contract and currently available to a network or TV station in the particular pay cable market in question. If it is under contract to a TV station or network, however, many times there are exclusivity provisions in effect preventing pay cable from licensing the film. 2/ At the end of ten years, pay cable can have access to a film in a given market area only if the movie has not been shown by a TV station in the last three years. The purpose of these rules was to prevent pay cable from "siphoning" a film from the "free" TV market. The rules are solely for the benefit of "free" TV. Thus, if a film were released on February 1, 1977 and marketed through theaters for two years until February 1979, as a practical matter, pay cable could bid to show it sometime within a period between February 1, 1979 to February 1, 1980. But, a network could contract at any time after release date for three exhibitions of the film starting on March 1, 1979 and as a condition of the contract and expressly allowed by the decree, it could demand exclusivity against pay cable starting on February 1,

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1/ E.G., see hearings on Pay Cable Television Industry before the Subcommittee on Antitrust and Monopoly, 94th Cong., 1st Sess. at pp. 401-404 (1975).

2/ See testimony of CBS President Arthur R. Taylor, who acknowledged that this company obtained exclusivity within the 3-10 year period. Hearings on the Pay Cable Television Industry before the Senate Subcommittee on Antitrust and Monopoly, 94th Cong., 1st Sess. at 160-161 (July 8, 1975).

1979 until March 1, 1982. If the film was then not contracted for by a TV station in the particular pay cable operators market, it could not be licensed to that pay cable operator until February 1, 1987. If the film was contracted for by a TV station, the great majority of these contracts also contain exclusivity provisions barring pay cable exhibition. In this type of situation, assuming that the exclusivity runs until February 1987, pay cable could show the film after February 1, 1987 only if the film had not been shown in the last three years.

Current industry practice has been to demand exclusivity during the availability period which has usually been 24 months for two showings. The networks have also usually obtained exclusivity for sixty days prior to the availability period. 3/ Thus, the consent decree provision is very similar to the current industry practice, differing only by thirty days.

Subsection VI(E)(iii)(e) does represent quite a departure from the previous position of the Department of Justice which has been expressed in submissions to the FCC, testimony before this Subcommittee, and amicus briefs at the Court of Appeals level. On November 1, 1972 and on October 4, 1974, the Justice Department filed comments in FCC Docket 19554 which concerned these pay cable rules. In its 1972 comments, the Department concluded that:

> ". . . (1) there was insufficient evidence to support a finding that programming restrictions on pay cable were in the public interest as defined in the Communications Act of 1934, (2) the imposition of onerous programming restrictions upon pay cable would preclude it from developing into a medium capable of increasing the diversity of this nation's communications system and (3) the Commission should free pay cable from the various programming restrictions then imposed upon it in order to avail itself of an opportunity to obtain empirical evidence as to whether <u>any</u> type of programming restrictions were, in fact, necessary to protect the public interest."

3/ See testimony of Robert Howard, President, NBC Television Network. Hearings on the Pay Cable Television Industry, 94th Cong., 1st Sess., at pp. 219-230 (July 8, 1975) before the Subcommittee on Antitrust and Monopoly.

In its updated 1974 comments the Department stated:

> ". . . subsequent events have only reaffirmed our conviction that Commission attempts to protect the broadcasting industry from competitors in order to guard the public against unspecified dangers will have the dual effect of retarding the development of pay cable as a means of diversifying our communications system and embroiling the Commission in a continuous effort to develop increasingly intricate rules based upon speculation rather than experience."

On July 15, 1975, Deputy Assistant Attorney General Donald Baker, now head of the Antitrust Division, testified before the Antitrust Subcommittee stating that --

> ". . . the FCC has proceeded, more or less on an ad hoc basis to erect barriers to cable services, largely on the basis of speculative fears of the broadcast television industry." (Hearings before the Antitrust and Monopoly Subcomittee, Pay Cable, July 15, 1975, p. 234)

He also specifically mentioned the exclusivity issue, declaring that --

> "The so-called pay-cable rules, of course, are logical extensions of these earlier illogical exercises of regulatory power. The 2-year period after general release during which a cable operator could bid for a film was indeed increased to 3 years. In oversight testimony, the Chairman of the Commission described this as a major expansion in film availability, without, however, explaining why the restriction was ever justified to begin with." (Hearings p. 234)

In addition, as late as February 1976, the Department of Justice again reiterated its views -- this time in an amicus brief supporting the removal of the FCC restrictions on pay cable. The Department observed that decisions concerning the development of new technology "are too important to be based upon surmise, conjecture, or concern for the profit margins

of those that provide the existing service." (Home Box Office, Inc. v. FCC, No. 75-1280 et al. Brief for Respondent U.S.A. at 35.)

In furtherance of their oft-stated critical view of schemes that deny competitive opportunity, the Department's Competitive Impact Statement asserts that the Antitrust Division "first proposed that NBC be permitted such exclusivity for only 45 days before and after each network exhibition date of a feature film." The provision eventually accepted by both parties was, as mentioned before, a maximum of 24 months exclusivity for two telecasts with 12 months for each additional telecast and 30 days exclusivity allowable prior to the first date NBC could telecast the film. It is important to note that the 45 days first proposed was 45 days before actual exhibition, whereas the thirty days in the decree is 30 days before there is a right to telecast the film. Thus, the decree would allow NBC to contract for exclusivity for up to 25 months before actually broadcasting a movie, whereas under the Department's original proposal, it would have been a maximum of 45 days. 4/

Since actual industry practice consists of 24 months of exclusivity within the availability period for two telecasts with 60 days of exclusivity before the availability period, the decree does limit the exclusivity slightly. A contract for two exhibitions used to have an exclusivity provision foreclosing cable's access to the movie for 26 months, now it would be limited to 25 months. As a practical matter, as long as exclusivity can be obtained from the date the movie could first be marketed to cable until the FCC Rules take effect, which can be achieved in either 25 or 26 months, there is only one difference between industry practice and the practice specified in the decree. This crucial difference is that now this practice appears to have the full approval of the Department of Justice and is subject to a judicial imprimatur if this provision in the consent decree is upheld by the court.

There are important public policy and antitrust reasons against having these types of exclusivity provisions in a contract between movie producers and networks. The combined effect of these provisions could easily prevent consumers from exercising their choice as to how they want to be entertained. Even though the producers profit from their dealings with the

4/ Actually the provision as accepted does not seem to even require NBC to actually broadcast the film -- it speaks solely in terms of broadcast rights.

networks and thus often readily accede to their demands, the producers have testified that with exclusivity obtained by the sheer market power of the networks they are often foreclosed from a market they would like to service. 5/ Also, since pay cable apparently provides the financial base for other more experimental and educational cable services, provisions which unnecessarily retard pay cable's growth may totally stymie the entire cable industry. The presence of these contractual provisions was constantly subject to legal questions and possible private antitrust actions prior to the proposal of the consent decree. The Department's imprimatur upon this practice makes it virtually certain that this practice will greatly increase in magnitude in the future. As noted by many antitrust experts, the combination of restraints -- the number of movies tied up by exclusivity provisions -- is a very important factor when judging the legality of these provisions. Before the Department approves this practice, there remains the possibility that this combined effect would reach a point where it would be judged illegal. With the Department's approval of the practice without limits on the number of movies, the flexibility of the antitrust laws is needlessly lost.

On antitrust grounds alone, and these are ordinarily an accurate reflection of public policy considerations, there is an overwhelming body of law stating that exclusivity provisions are restraints of trade which must be justified as reasonable or fall within the prohibitions of the Sherman Act. In the Paramount case, which is one of the leading cases in this area, one of the issues involved was the reasonableness of exclusivity provisions in contracts between a producer and exhibitor which prevented the producer from licensing the same film to other exhibitors. The rationale behind these exclusivity provisions, which are called clearances in movie industry terminology, was that a given theater would be more likely to pay more for a movie if it knew it was not going to have its competitors showing the same picture and perhaps undercutting its admission price. The Supreme Court ruled that all the circumstances of each clearance had to be examined to see if that particular clearance was reasonable, and that a key factor in this examination was whether the exclusivity provision is "reasonably necessary to protect the licensee in the run granted." (United

5/ See generally the testimony of movie producers at hearings on the Pay Cable Televisions Industry before the Sub committee on Antitrust and Monopoly, 94th Cong., 1st Sess. at pp. 90-118 (May 21, 1975).

States v. Paramount Pictures, 334 U.S. 131, at p. 147). The District Court ruled and the Supreme Court affirmed that "many clearances had no relation to the competitive factors which alone could justify them." (334 U.S. at 146) The requirement that there be some connection between the exclusivity provision or "clearance" and the competitive factors involved in each situation would quite clearly not be met by the provisions in this consent decree, because this decree virtually gives a blank check of approval to the industry's usual practice of obtaining more than two years of exclusivity against pay cable. The consent decree's acquiescence in these lengthy exclusivity provisions will greatly encourage what has already been acknowledged as an industry practice but which is not now used with all films. This unwarranted insulation from the antitrust laws will readily result in a uniformity and inflexibility much worse than that condemned in Paramount.

> ". . . The clearances which were in vogue had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade." (334 U.S. at 146)

In Standard Oil Co. v. United States, 337 U.S. 293 (1949), the fact that exclusivity provions had become an industry-wide practice made them particularly vulnerable to antitrust attack, because they were used to "prevent a late arrival from wresting away anymore than an insignificant portion of the market" (337 U.S. at 309). In Lorain Journal Co. v. United States, 342 U.S. 143 (1951), a newspaper, which had monopolistic power as a seller of advertising space, conditioned its sales upon a clause preventing the entity from buying advertising from a new radio station. The newspaper's abuse of its dominant purchasing power to discourage a new entrant was found to violate the Sherman Act. The networks' practice of obtaining lengthy exclusivity against pay cable is also an abuse of dominant purchasing power. The decree contains no limit on the number of films on which NBC could obtain exclusivity nor would there be a limit on the films the other networks could obtain. The Department's lawsuits recognized -- indeed were premised upon -- the possession and abuse of dominant purchasing power by the networks; yet, subsection VI(E)(iii)(e) would preserve and protect one of these abuses.

Without the consent decree provision, the key question with NBC would be whether or not, taking into account the FCC

Rules, the length and/or the existence of the exclusivity provisions is reasonably necessary for the protection of NBC. In Paramount the court emphasized that the burden of proof falls on the "party in the best position to evaluate their competitive effects," meaning the party demanding the protection. Thus, NBC should bear this burden. Yet, neither in testimony before the Antitrust Subcommittee nor apparently in the negotiations with the Justice Department, has NBC presented evidence that it needs long clearances in order to commercially survive. In fact, it is so difficult to even obtain advertising space on network air time, there has been serious talk about the formation of a fourth network. It must be remembered that in Paramount, clearances of a few weeks duration were declared unreasonable, whereas here we are talking about several years. Additionally, the Paramount clearances were designed to protect against lower priced competitors whereas here NBC is claiming it needs protection against competitors that only reach 1% of NBC's viewers, charge a much higher price and in fact offer a different product.

NBC does contend that pay cable systems have really not been hurt -- that there are plenty of movies available to them. The data used to support this contention has been challenged by the pay cable industry and has not been subjected to a full fact-finding process necessary to make such a determination. In any event, the answer is two-fold. One, the exclusivity provisions must be affirmatively justified by NBC as necessary to their own existence, rendering secondary the issue of whether or not pay cable has some movies available to it. Two, even if pay cable is not now being denied all films, through the consent decree the Government is now taking the safety off the loaded pistol the networks have pressed against cable's Achilles' heel. All the networks have to do is to use it by contracting for more movies and using the maximum exclusivity provisions with each one.

The Department has also not presented any evidence to justify approving these exclusivity provisions. The competitive impact statement required with the consent decree is woefully weak in this area, stating that:

> ". . . Section VI(E)(iii) will not, of course, prevent certain theatrical feature film distributors from continuing to deny NBC any exclusive rights as they have done in the past; it merely establishes outer limits on the exclusive rights NBC may require." (Competitive Impact Statement, p. 20)

The Department also stated that:

> "There are no materials or documents which the Government considered determinative in formulating the proposed consent judgment. Therefore, none is being filed with this competitive impact statement." (Competitive Impact Statement, p. 21)

It would be difficult under the circumstances of today's TV market and the presence of the FCC's 3-10 year Rule, to justify as reasonable even one of these contracts containing an exclusivity clause. The pertinent antitrust cases say that these exclusivity provisions must each be looked at in all their attendant circumstances. Yet, the Justice Department, without the benefit of a record, and in the context of a non-litigated consent decree with one network, would establish the legality of the provisions whose upper limits would undoubtedly become an industry-wide standard. The public interest would better be served by not immunizing these exclusivity provisions at the present time. For instance, if at a later date, this industry practice became even more pervasive, and lengthy exclusivity applied to all feature movies, then there would still be an available remedy under antitrust law. On the other hand, by saying that lengthy exclusivity provisions should not be immunized at this time, we are not suggesting that some sort of exclusivity could never be justified. There may in fact be appropriate situations, now or in the future, justifying limited exclusivity. Our point is simply that these provisions should not be frozen into existence at this time. Of course, if and when exclusivity is questioned on antitrust grounds, the networks could still sustain them as reasonable if they can marshall the appropriate evidence.

LINCOLN CENTER FOR THE PERFORMING ARTS, INC.
1865 BROADWAY (AT 61 STREET) NEW YORK, N.Y. 10023 (212) 765-5100
CABLE LINCENARTS

February 25, 1977

Mr. Bernard M. Hollander
Judgments and Judgment Enforcement
Section Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander:

While Lincoln Center for the Performing Arts, Inc., has no direct involvement in the NBC/Justice Department Consent Decree per se, we wish to go on record in opposition to legislation which restricts the development of the pay cable television industry. We contend that minority and special interest programming depends on the conduit which cable provides to an increasing number of viewer homes across the nation. We view the growth of the pay cable industry as a means of expanding that universe. We oppose the Consent Decree on the following grounds:

The Consent Decree will severely restrict pay cable television's potential to provide the feature films and sports which are the backbone of pay cable programming. It is this basic programming which is needed today in order to build access to the larger audience required for the expansion of special interest programming such as Lincoln Center's.

Furthermore, the Consent Decree will deny consumers their right to a choice of format in which to receive sports and feature films. Since programming on pay cable television is presented unedited and without commercial interruption, the consumer should have the opportunity to decide whether or not he wishes to pay for this advantage. We are particularly concerned with developing new means of paying for television programming. Our future as arts institutions may depend on reaching a paying television audience with our performances.

Because we feel that the growth of pay cable television is vital to the continuing development of the cable communications industry, we vigorously oppose all regulations which inhibit that growth, and specifically the NBC/Justice Department Consent Decree.

Sincerely,

John Goberman

John Goberman
Director of Media Development

JG/sm

COMMUNITY COALITION FOR MEDIA CHANGE CCMC

1728 Curtis Street #A Berkeley, Ca 94703 415 526-8801
Marcus Garvey Wilcher, Chairman
Edwin J. Terry, V. Chairman 626-5720

26 February 1977

Bernard M. Hollander, Chief
Judgements and Judgement
Enforcement Section
Anti-Trust Division
Washington, D.C. 20530

Dear Mr. Hollander,

The Community Coalition for Media Change wishes to express its concern and disagreement with the NBC and U.S. Department of Justice concent decree.

We believe that this agreement is an example of bowing to the powerful radio/television corporations at the expense of millions of Americans who assume that their interest, the public interest, comes first.

For these additional reasons we oppose the decree:

1) Disregard for the public right to watch recent films as they so choose.
2) The decree stifles entertainment variety and gives much too much control to network monoplies.
3) Exclusivity control should no extend beyond 2 or 3 months.

It is clear to citizens of this country that many persons on the public payroll, such as you are, do not represent us, but represent the non-moral corporations whose greed for excessive profits seems to be growing.

However, we still hope you will reconsider your action and void this unfair consent decree.

Sincerely,

Marcus Garvey Wilcher
Chairman

cc: Bob Johnson,
NCTA

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Attorneys for Optical Systems Corporation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., Defendant.	Civil No. 74-3601-RJK COMMENTS OF OPTICAL SYSTEMS CORPORATION TO STIPULATION AND FINAL JUDGMENT

The following are comments of Optical Systems Corporation regarding the proposed consent decree contained in the document entitled Final Judgment which is attached to the Stipulation filed November 17, 1976 in this action. These comments are filed pursuant to 15 U.S.C. § 16(b).

Optical Systems Corporation [hereinafter OSC], provides a channel of home television programming in return for a fee payable on a monthly basis. * Its headquarters is at 433 Airport Boulevard in Burlingame, California and it does business in many cities and regions in California as well as the states of Hawaii, Texas, Ohio, Michigan and Pennsylvania, providing subscription television programming to more than 50,000 subscribers.

Virtually all of the program material OSC provides consists of feature length motion pictures which were initially released for theatre exhibition. OSC has discovered that there is a distinct and significant demand for in-home movies presented in their original form, uninterrupted by commercial breaks, and that the subscription television business is a distinct new medium of entertainment which fulfills a heretofore unsatisfied need. At the same time, there are regulations of the Federal Communications Commission which severely limit the number of films which are available for exhibition by subscription television operators, and of course, the number and quality of films available directly affects OSC's ability to attract and retain subscribers.

OSC and NBC are in direct competition for feature length motion pictures which remain available under the FCC regulations and they obtain those films from the same producer and distributor supply sources. However, when NBC obtains the rights to exhibit films, it typically includes in the contract a provision which prohibits the supplier from providing the film or films to OSC for various periods of time. The time periods to which these provisions apply are exceedingly long and extend to several years or more in most instances. During this time period, NBC will typically

* This service shall be referred to hereinafter as subscription television programming.

have the right under the contract to exhibit the film between one and three times. Thus, for more than ninety-nine percent of the days during which the films are subject to these contracts and hence forbidden to OSC, they are simply held by the networks and not exhibited.*

At any one time a substantial number of films of quality suitable for exhibition by OSC are unavailable because of these contract provisions, and OSC could increase significantly the number of quality films it exhibits per month in their absence. The provisions create an artificial shortage of films for subscription television and have no legitimate purpose. Since the affected films are in interstate commerce, these contracts directly violate Section 1 of the Sherman Antitrust Act by restraining trade in the market for the films. The arrangement contained in the proposed consent decree does not alter the practices described herein

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* In the late spring of 1975 the Antitrust Subcommittee of the Senate Judiciary Committee held hearings on the contracts described in this paper and a large number of the contract provisions in question were produced. Copies of those which appeared in the report of those hearings are attached to this paper as an exhibit. (See Hearings on Pay Cable Television Industry Before the Subcommittee on Judiciary, 94th Cong., 1st Sess. (1975).)

///

in any significant way * and consequently also violates the antitrust laws in that respect. Any final consent decree in this litigation should be conditioned on the defendant's agreement that it will rescind all existing contract provisions which restrict in any way the number of motion pictures available to subscription television operators and that it will not enter contracts in the future which contain similar provisions.

Dated: February 25, 1977.

RICHARD J. ARCHER
JOHN F. DWYER
SULLIVAN JONES & ARCHER

By John F. Dwyer
Attorneys for Optical Systems Corporation

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* The proposed Final Judgment would allow NBC to contract for films with exclusive rights over subscription television for a twenty-five month period and for additional twelve month periods for each additional single exhibition of the film or films greater than two. (Final Judgment at 9-10.) The Competitive Impact Statement filed in conjunction with the Stipulation and Final Judgment comments that this feature eliminates NBC's ability to obtain "exclusivity for several years from the date of the contract until the conclusion of the network run" and the "possibility that NBC can 'warehouse' feature films for a number of years before exhibiting them on network television". (Competitive Impact Statement at 20.) This statement is incomprehensible. The subject provision allows by its very terms precisely what the Competitive Impact Statement says it does not allow.

EXCLUSIVITY PROVISIONS OF 1974 THEATRICAL FILM CONTRACTS FOR ABC

January 14, 1974—American International Television, Inc.

3. *Exclusivity.*—Licensor shall have the right to exhibit and exploit the Film during the period beginning on January 14, 1974 and continuing through the end of the Broadcast Period; provided, however, that Licenser will not authorize the broadcast or transmission of all or any portion of the Film (or of any remake of or sequel to the Film or of any television pilot, television program, or television program series based on the Film or based on any of the human or nonhuman characters in the Film or on the literary property underlying the Film) through air waves, cable, or any other manner or means to television receivers, monitors, or screens in the Broadcast Area or in Windsor, Ontario, Canada or Tijuana, Mexico (other than pursuant to the rights granted to ABC hereunder) during the period beginning on January 14, 1974 and ending upon the expiration of the Broadcast Period (or ending as many as sixty (60) days after such expiration, if after such expiration any delayed broadcast or delayed broadcasts shall be made as part of any Network Broadcast hereunder of the Film), except: (i) pay television in nonresidential hotels, motels, hospitals, bars, restaurants, and other nonresidential institutions; and (ii) exhibition in passenger-carrying vehicles.

March 8, 1974—Columbia Pictures Industries

(c) *Exclusivity.*—Licensor warrants that during the period beginning March 8, 1974 and continuing through the end of the Authorized Broadcast Period, the Film will not be exhibited by Licensor, or pursuant to Licensor's authorization, in any medium in the Broadcast Area or Windsor, Ontario, except by ABC pursuant to this Agreement, other than in the following media ("Licensor's Permissible Media"): (i) theatrical and non-theatrical direct projection; (ii) sale, lease, or other physical distribution of video cassets; (iii) closed circuit television in hotels, motels, and similar institutions, and hospitals, so long as none of the foregoing are primarily reasonably permanent residences (except as permitted under subparagraph (vi) below); (iv) exhibition on passenger-carrying vehicles; (v) in the Spanish language (in addition to the media specified in subdivisions (i) through (iv), as to which there is no restriction) all other media, to commence after the completion of the first Network Broadcast of the Film; and (vi) toll, pay and subscription television via cable or any other means, where a "per program" or "per channel" charge is made for viewing until one month prior to the Authorized Broadcast Period.

April 5, 1974—United Artists Corp.

3. *Exclusivity.*—(a) Licensor shall have the right to exhibit and exploit the Film without limitation during the period beginning April 5, 1974 and continuing through the end of the Broadcast Period, provided that licensor will not authorize the Film to be transmitted through air waves, cable, or any other manner or means to television sets in the Broadcast Area or Windsor, Ontario (other than pursuant to the rights granted to ABC hereunder), except: (i) sale or rental of video cassette cartridges or similar devices; (ii) cable or pay television in non-residential hotels, motels, hospitals, bars, restaurants, and other non-residential institutions; and (iii) passenger-carrier exhibition.

(b) In addition to the rights granted to Licensor to exhibit and exploit the Film pursuant to subdivisions 3(a)(i), (ii), and (iii) hereof, Licensor shall have the right to exhibit and exploit the Film through CATV by any manner or means, and toll, pay and subscription television until June 30, 1975. Licensor warrants that thereafter, except for the uses permitted in subdivisions 3(a)(i), (ii), and (iii) hereof, Licensor shall not authorize any such exhibition or exploitation of the Film through CATV by any manner or means, or toll, pay or subscription television until after the end of the Broadcast Period.

Exhibit A

(c) To the extent that Licensor controls remake rights in the Film, Licensor agrees that it will not authorize the broadcast of such remake in the Broadcast Area during the Broadcast Period.

(d) If Licensor notifies ABC in advance of any re-release of the Film for theatrical direct projection during the Broadcast Period in the Broadcast Areas, then ABC will consult and cooperate with Licensor by considering any request by Licensor that ABC refrain from making any Network Broadcast of the Film during such re-release period, but in case of disagreement ABC's determination shall prevail.

May 3, 1974—Independent Television Corp.

3. *Exclusivity.*—Licensor shall have the right to exhibit and exploit the Film during the period beginning on May 3, 1974 and continuing through the end of the Broadcast Period; provided, however, that Licensor will not authorize the broadcast or transmission of all or any portion of the Film (or any remake of or sequel to the Film) through air waves, cable, or any other manner or means to television receivers, monitors, or screens in the Broadcast Area or in Windsor, Ontario, Canada or Tijuana, Mexico (English language only) (other than pursuant to the rights granted to ABC hereunder) during the period beginning on May 3, 1974 and ending upon the expiration of the Broadcast Period.

May 6, 1974—Bing Crosby Productions, Inc.

3. *Exclusivity: First negotiation/first refusal.*—(a) Licensor shall have the right to continue to exhibit and exploit the Film during the period beginning on May 6, 1974 and continuing through the end of the Broadcast Period: provided, however, that Licensor will not authorize the broadcast or transmission of all or any portion of the Film (or of any remake of or sequel to the Film or of any television pilot, television program, or television program series based on the Film or based on any of the principal human characters in the Film or on the literary property underlying the Film or on the life of Buford Pusser) through air waves, cable, or any other manner or means to television receivers, monitors, or screens in the Broadcast Area or in Windsor, Ontario, Canada (other than pursuant to the rights granted to ABC hereunder) during the period beginning on May 6, 1974 and ending on and including (A) with respect to each such television pilot, television program, and television series and each portion thereof, the date which is two (2) years after the beginning of the Broadcast Period or the date of completion of second network broadcast hereunder of the Film (including, without limitation, the completion of any and all delayed broadcasts made as part of said second network broadcast), whichever date occurs earlier (such date being called in subparagraph 3(b) hereof the "End Date") and (B) with respect to the Film and each portion thereof and each such remake and sequel and each portion thereof, the date of expiration of the Broadcast Period, except: (i) pay television in nonresidential hotels, motels, hospitals, bars, restaurants, and other nonresidential institutions; and (ii) exhibition in passenger-carrying vehicles.

August 12, 1974—United Artists Corp.

3. *Exclusivity.*—(a) Licensor shall have the right to exhibit and exploit the Film without limitation during the period beginning August 12, 1974 and continuing through the end of the Broadcast Period, provided that Licensor will not authorize the Film to be transmitted through air waves, cable, or any other manner or means to television sets in the Broadcast Area or Windsor, Ontario (other than pursuant to the rights granted to ABC hereunder), except: (i) sale or rental of video cassettes, cartridges, or similar devices; (ii) cable or pay television in nonresidential hotels, motels, hospitals, bars, restaurants, and other nonresidential institutions; and (iii) passenger-carrier exhibition.

(b) To the extent that Licensor controls remake rights in the Film Licensor agrees that it will not authorize the broadcast of such remake in the Broadcast Area during the Broadcast Period.

(c) In addition to the rights reserved by Licensor to exhibit and exploit the Film pursuant to subdivisions 3(a)(i), (ii), and (iii) hereof, Licensor shall have the right to exhibit and exploit the Film through CATV by any manner or means, and toll, pay, and subscription television for two (2) years from June 8,

1974, Licensor's general theatrical release date, or until the start of the Broadcast Period, whichever is earlier. Licensor warrants that thereafter, except for the uses permitted in subdivisions 3(a)(i), (ii), and (iii) hereof, Licensor shall not authorize any such exhibition or exploitation of the Film through CATV by any manner or means, or toll, pay, or subscription television until after the end of the Broadcast Period.

November 15, 1974—Bing Crosby Productions, Inc.

8. *Exclusivity*—Licensor shall have the right to continue to exhibit and exploit the Film during the period beginning on November 15, 1974 and continuing through end of the Broadcast Period: provided, however, that Licensor will not authorize the broadcast or transmission of all or any portion of the Film (or of any remake of or sequel to the Film or of any television pilot, television program, or television program series based on the Film or based on any of the principal human characters in the Film or on the literary property underlying the Film) through air waves, cable, or any other manner or means to television receivers, monitors, or screens in the Broadcast Area or in Windsor, Ontario, Canada (other than pursuant to the rights granted to AEC hereunder) during the period beginning on November 1, 1974, and ending on and including (A) with respect to each such television pilot, television program, and television program series and each portion thereof, the date which is two (2) years after the beginning of the Broadcast Period or the date of completion of the second Network Broadcast hereunder of the Film (including, without limitation, the completion of any and all delayed broadcasts made as part of said second Network Broadcast), whichever date occurs earlier, (B) with respect to the Film and each portion thereof and each such remake and each portion thereof, the date of expiration of the Broadcast Period, and (C) with respect to each such sequel and each portion thereof, the date of completion of the second Network Broadcast hereunder of the Film (including, without limitation, the completion of any and all delayed Broadcasts made as part of such second Network Broadcast) or date of expiration of the Broadcast Period, whichever date occurs earlier, except: (i) pay television in nonresidential hotels, motels, hospitals, bars, restaurants, and other nonresidential institutions; (ii) residential pay television, but in no event after the date which is six (6) months prior to the beginning of the Broadcast Period; and (iii) exhibition in passenger-carrying vehicles.

November 19, 1974—Columbia Pictures Television

(c) *Exclusivity*.—Licensor warrants that during *the period beginning November 19, 1974 and continuing through the end of*[1] the Authorized Broadcast Period, the Film will not be exhibited by Licensor, or pursuant to Licensor's authorization, in any medium in the Broadcast Area or Windsor, Ontario, except by AEC pursuant to this Agreement, other than in the following media ("Licensor's Permissible Media"): (i) theatrical and non-theatrical direct projection; (ii) sale, lease, or other physical distribution of video cassettes; (iii) closed circuit television in hotels, motels, and similar institutions, and hospitals, so long as none of the foregoing are primarily reasonably permanent residences; (iv) exhibition on passenger-carrying vehicles; (v) in the Spanish language (in addition to the media specified in subdivisions (i) through (iv), as to which there is no restriction) all other media, to commence after the completion of the first Network Broadcast of the Film; and (vi) toll, pay and subscription television via cable or any other means, where a "per program" or "per channel" charge is made for viewing until one month prior to the Authorized Broadcast Period.

December 16, 1974—Twentieth Century-Fox Film Corp.

6. *Exclusivity*.—(a) Licensor shall have the right, without limitation, to exhibit and exploit the Film via cable or pay television in nonresidential institutions, including, but not limited to, hotels, motels, hospitals, bars and restaurants ("Institutional cable television") during the period commencing with the date

[1] EDITOR'S NOTE.—The same provision was also included in licensing agreement with the italicized words deleted.

first written above and continuing through September 30, 1975 ("Exploitation Period (a)"); and Licensor warrants that immediately subsequent thereto and throughout the Broadcast Period it will not authorize or permit the exhibition or exploitation of the Film by any of the means set forth above in this subparagraph 5(a); provided, however, that in the event that Licensee shall elect to schedule the Network Broadcast of the Film within the first thirty (30) days of the Broadcast Period, Licensee shall notify Licensor to such effect no later than thirty (30) days prior to the date of such scheduled Network Broadcast, and in such event Exploitation Period (a) shall expire (30) days prior to the date of such scheduled Network Broadcast.

(b) Licensor shall have the right, without limitation, to exhibit and exploit the Film through any means of "pay television" not provided for in subparagraph 5(a) immediately above, during the period beginning with the date first written above and continuing until six (6) months prior to the scheduled Network Broadcast, or until March 31, 1975, whichever is later ("Exploitation Period (b)"); and Licensor warrants that for the period commencing immediately subsequent to Exploitation Period (b) and continuing through the date upon which the Broadcast Period expires it will not authorize or permit the exhibition of the Film by any of the means set forth above in this subparagraph 5(b). As used herein, the term "pay television" refers to all means of television exhibition, other than those set forth in subparagraph (a) above, for which a per-program charge is imposed, including but not limited to "toll," "subscription" and "cable" services.

December 27, 1974—Twentieth Century-Fox Film Corp.

Exclusivity.—(a) Licensor shall have the right, without limitation, to exhibit and exploit the Film via cable or pay television in non-residential institutions, including but not limited to hotels, motels, hospitals, bars and restaurants ("Institutional cable television") during the period commencing with the date first written above and continuing until commencement of the Broadcast Period ("Exploitation Period (a)"); and Licensor warrants that immediately subsequent thereto and throughout the Broadcast Period it will not authorize or permit the exhibition or exploitation of the Film by any of the means set forth above in this subparagraph 5(a); provided, however, that in the event that Licensee shall elect to schedule the Network Broadcast of the Film within the first thirty (30) days of the Broadcast Period, Licensee shall notify Licensor to such effect no later than thirty (30) days prior to the date of such scheduled Network Broadcast, and in such event Exploitation Period (a) shall expire thirty (30) days prior to the date of such scheduled Network Broadcast.

(b) Licensor shall have the right, without limitation, to exhibit and exploit the Film through any means of "pay television" not provided for in subparagraph 5(a) immediately above, during the period beginning with the date first written above and continuing six (6) months prior to the commencement of the Broadcast Period ("Exploitation Period (b)"); and for the period commencing immediately subsequent to Exploitation Period (b) and continuing through the Broadcast Period, Licensor warrants that it will not authorize or permit the exhibition of the Film by any of the means set forth above in this subparagraph 5(b). As used herein, the term "pay television" refers to all means of television exhibition, other than those set forth in subparagraph (a) above, for which a per-program charge is imposed, including but not limited to "toll," "subscription" and "cable" services.

EXCLUSIVITY PROVISIONS OF 1974 THEATRICAL FILM CONTRACTS FOR CBS

March 27, 1974—Medallion TV Enterprises

12. *Exclusivity*.—(a) Licensor warrants that the motion pictures will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the

applicable motion picture (including any delayed broadcasts), whichever date first occurs (such period being herein called the "Exclusive Period"). Licensor warrants further that Licensor will not broadcast or transmit the motion pictures, and will not authorize any other person, firm or corporation to broadcast or transmit the motion pictures during the Exclusive Period by wire, cable, community antenna television system or any other means, including "toll, pay or subscription" television within the Broadcast Area (or in Windsor, Ontario).

April 10, 1971 as amended, September 30, 1974—Warner Brothers

10. *Exclusivity.*—(a) Licensor warrants that the motion pictures will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area except pursuant hereto during the period commencing on the date first above written and ending upon the expiration of the Broadcast Period applicable to such motion picture or the day after the last permitted network broadcast (including delayed broadcasts) of such motion picture, whichever date is earlier, such period in regard to such three (3) motion pictures being herein called the "Exclusive Period." Licensor further warrants that the motion pictures will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area except pursuant hereto during the period commencing on the date first above written and ending upon expiration of the Broadcast Period applicable to such motion picture or after the last permitted network broadcast (including delayed broadcasts) of such motion picture, whichever date is earlier, except that it is understood that the motion picture has heretofore been licensed by Licensor to the ABC Television Network for three (3) network broadcasts and the motion pictures each have been heretofore licensed to the NBC Television Network for three (3) network broadcasts. It is therefore, understood that network broadcasts of the motion picture on the ABC Television Network and network broadcasts of the motion pictures on the NBC Television Network (each limited to not more than three (3) network broadcasts), shall not be deemed in breach of the foregoing, provided that the network broadcasts on the ABC Television Network of the motion picture occur prior to November 1, 1976; that the network broadcasts on the NBC Television Network of the motion picture occur prior to December 1, 1976; and that the network broadcasts on the NBC Television Network of the motion picture occur prior to November 1, 1977.

Subject to these exceptions, and notwithstanding such exceptions, the period commencing with the date hereof and ending upon the expiration of the Broadcast Period applicable to such three (3) motion pictures, or ending upon the day after the last permitted broadcast (including delayed broadcasts) of the applicable motion picture, whichever date is earlier, shall herein be called the "Exclusive Period." Licensor also warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located in Windsor, Ontario except on the basis of authorizations granted by Licensor prior to the date of this Agreement and that Licensor will not hereafter grant any new licenses for such broadcasts and transmissions during the term of this Agreement. Licensor warrants further that Licensor will not transmit any motion picture and will not authorize any other person, firm or corporation to transmit any motion picture during the Exclusive Period by wire, cable or any other means, including "toll, pay or subscription" television, to television receivers located within the Broadcast Area.

April 16, 1974 as amended, October 29, 1974, November 11, 1974—Ben Barry and Associates

April 16, 1974—Ben Barry and Associates

April 19, 1974—Monroe Rapaport

July 9, 1974—Rosamond Productions

13. *Exclusivity.*—(a) Licensor warrants that the motion picture will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing on the day and

year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the motion picture hereunder (including any broadcasts pursuant to exercise by CBS of its option pursuant to paragraph 1(b) hereof), whichever date first occurs (such period being herein called the "Exclusive Period"). Licensor warrants further that Licensor will not broadcast or transmit the motion picture and will not authorize any other person, firm or corporation to broadcast or transmit the motion picture during the Exclusive Period by wire, cable, community antenna television system or any other means, including "toll, pay or subscription" television within the Broadcast Area (or in Windsor, Ontario).

April 26, 1974—Cinema 5, Ltd.

12. *Exclusivity.*—(a) Licensor warrants that the motion pictures will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area, except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the applicable motion picture (including any delayed broadcasts), whichever date first occurs (such period being herein called the "Exclusive Period"). Licensor warrants further that Licensor will not broadcast or transmit the motion pictures, and will not authorize any other person, firm or corporation to broadcast or transmit the motion pictures during the Exclusive Period by wire, cable, community antenna television system or any other means, including "toll, pay or subscription" television within the Broadcast Area.

July 2, 1974 as amended, July 2, 1974, September 27, 1974—United Artists

July 2, 1974 as amended, July 2, 1974, September 27, 1974 (7 pictures)—United Artists

12. *Exclusivity.*—(a) Licensor warrants that the motion picture will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days (for the purpose of delayed broadcasts in each delayed broadcast market), after the second "network broadcast" of the motion picture, whichever date first occurs (such period being herein called the "Exclusive Period"). Licensor warrants further that Licensor will not broadcast or transmit the motion picture and will not authorize any other person, firm or corporation to broadcast or transmit the motion picture during the Exclusive Period by wire, cable, community antenna television system or any other means, including "toll, pay or subscription" television within the Broadcast Area (or in Windsor, Ontario).

UNITED ARTISTS CORPORATION, SEPTEMBER 27, 1974.
729 Seventh Avenue, New York, N.Y.

GENTLEMEN: Reference is made to the following documents:

(a) Film License Agreement dated as of July 2, 1974 whereby you licensed to us the motion picture for television broadcast.

(b) Film License Agreement dated as of July 2, 1974 whereby you licensed to us seven (7) motion pictures for television broadcast.

(c) Amendatory letter dated July 2, 1974 whereby you licensed to us three (3) network broadcasts to be selected from the motion pictures licensed to us pursuant to the Film License Agreements specified in subsections (a) and (b) hereinabove, as well as from the motion picture.

In connection with the foregoing Film License Agreements, you have advised us that you have made arrangements for the exhibition of the motion pictures over "community antenna television systems." We therefore agree that notwithstanding anything contained in paragraphs 8 (LICENSE) and 12(a) (EXCLUSIVITY) of the respective Film License Agreements, you shall have the right to broadcast or transmit, or license the broadcast or transmission by wire, cable,

community antenna television systems (including "toll, pay or subscription" television), but not by any means of broadcast and/or transmission over the air, the picture in the Broadcast Area at any time but only prior to December 31, 1974, and that the motion picture may be broadcast or transmitted (or licensed for broadcast or transmission), in the same manner and subject to the same limitations, in the Broadcast Area at any time but only prior to September 1, 1975.

We further agree that notwithstanding anything contained in the documents specified hereinabove, you may license the motion picture the seven (7) motion pictures licensed to us pursuant to the Film License Agreement specified in subsection (b) above, as well as the motion picture for exhibition in the Broadcast Area over closed circuit television solely in hotels and motels and solely on the condition that the occupant of each separate hotel or motel room is required to pay a separate and distinct charge based on the number of programs supplied or a standard charge based on the hours of service provided or that the particular hotel or motel pays a separate and distinct per room per day charge for each room of the applicable hotel or motel in connection with the service provided.

Very truly yours,

CBS TELEVISION NETWORK,
A DIVISION OF CBS INC.

July 9, 1974 as amended, October 31, 1974—Teleworld Inc.

13. *Exclusivity.*—(a) Licensor warrants that the motion picture will not be broadcast or transmitted pursuant to any authorization of Licensor over any television station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing January 1, 1976 and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the motion picture hereunder (including any broadcasts pursuant to exercise by CBS of its option pursuant to paragraph 4(b) hereof), whichever date first occurs (such period being herein called the "Exclusive Period"). Licensor warrants further that Licensor will not broadcast or transmit the motion picture and will not authorize any other person, firm or corporation to broadcast or transmit the motion picture during the Exclusive Period by wire, cable, community antenna television system or any other means, including "toll, pay or subscription" television within the Broadcast Area (or in Windsor, Ontario). Nothing contained in this paragraph 13(a) shall be deemed to prohibit Licensor from authorizing the Licensing or the performance of the motion picture on ships or aircraft.

July 18, 1974 (14 pictures)—Warner Brothers

16. *Exclusivity.*—(a) Licensor warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area except pursuant hereto during the period commencing on the date first above written and ending upon the expiration of the Broadcast Period applicable to such motion picture or the day after the last permitted network broadcast (including delayed broadcasts) of such motion picture, whichever date is earlier, such period being herein called the "Exclusive Period." Licensor also warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located in Windsor, Ontario except on the basis of authorizations granted by Licensor prior to the date of this Agreement and that Licensor will not hereafter grant any new licenses for such broadcasts and transmissions during the term of this Agreement. Licensor further warrants that Licensor will not transmit any motion picture hereunder, and will not authorize any other person, firm or corporation to transmit any such motion picture, during the Exclusive Period by wire, cable or other means, including "toll, pay or subscription" television to television receivers located within the Broadcast Area; provided, however, that Licensor shall have the right, with respect to each motion picture hereunder, to authorize the transmission thereof over the facilities of any toll, pay or subscription television system transmitting programs by means of wire or cable to television receivers located in the Broadcast Area to subscribing members of the public who pay a per-program or per-channel charge for the

right to receive program material originated by such system, provided that any such transmission shall only occur prior to the following applicable dates in regard to each of the motion pictures hereunder:

The motion picture prior to January 1, 1976.
The motion picture prior to June 1, 1976.
The motion picture prior to July 1, 1975.
The motion picture prior to April 1, 1975.
The motion picture prior to December 1, 1975.
The motion picture prior to July 1, 1973.
The motion picture prior to August 1, 1976.
The motion picture prior to November 1, 1975.
The motion picture prior to May 1, 1975.
The motion picture prior to June 1, 1972.
The motion picture prior to June 1, 1973.
The motion picture prior to July 1, 1974.
The motion picture prior to _____

Notwithstanding anything contained in the preceding portion of this subparagraph (a) to the contrary, Licensor shall have the right to license the motion pictures hereunder during the Exclusive Period in the Broadcast Area over any closed circuit television system operating solely within hotels and motels *and hospitals* on condition that under the terms of such licensing the occupant of each separate hotel or motel room is required to pay a separate identifiable charge based upon the number of programs supplied or the number of hours of service provided or that the particular hotel or motels pays a separate and identifiable per-room per-day charge for each room therein for the service provided.

July 18, 1974 (6 pictures)—Warner Brothers

16. *Exclusivity.*—(a) Licensor warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area except pursuant hereto during the period commencing on the date first above written and ending upon the expiration of the Broadcast Period applicable to such motion picture or the day after the last permitted network broadcast (including delayed broadcasts) of such motion picture, whichever date is earlier, such period being herein called the "Exclusive Period." Licensor also warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located in Windsor, Ontario except on the basis of authorizations granted by Licensor prior to the date of this Agreement and that Licensor will not hereafter grant any new licenses for such broadcasts and transmissions during the term of this Agreement. Licensor further warrants that Licensor will not transmit any motion picture hereunder, and will not authorize any other person, firm or corporation to transmit any such motion picture, during the Exclusive Period by wire, cable or other means, including "toll, pay or subscription" television to television receivers located within the Broadcast Area; provided, however, that Licensor shall have the right, with respect to each motion picture hereunder, to authorize the transmission thereof over the facilities of any toll, pay or subscription television system transmitting programs by means of wire or cable to television receivers located in the Broadcast Area to subscribing members of the public who pay a per-program or per-channel charge for the right to receive program material originated by such system, provided that any such transmission shall only occur prior to the following applicable dates in regard to each of the motion pictures hereunder:

The motion picture prior to January 1, 1975.
The motion picture prior to January 1, 1975.
The motion picture prior to January 1, 1975.
The motion picture prior to July 1, 1976.
The motion picture prior to July 18, 1974.
The motion picture prior to June 1, 1975.

Notwithstanding anything contained in the preceding portion of this subparagraph (a) to the contrary, Licensor shall have the right to license the motion pictures hereunder during the Exclusive Period in the Broadcast Area over any closed circuit television system operating solely within hotels and motels on

condition that under the terms of such licensing the occupant of each separate hotel or motel room is required to pay a separate identifiable charge based upon number of programs supplied or the number of hours of service provided or that the particular hotel or motel pays a separate and identifiable per-room per-day charge for each room thereon for the service provided.

August 7, 1974—Twentieth Century-Fox

13. *Exclusivity.*—(a) Licensor warrants that the motion picture will not be broadcast or transmitted pursuant to any authorization of Licensor over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast Period or sixty (60) days after the last authorized network broadcast of the motion picture hereunder, whichever date first occurs (such period being herein called the "Exclusive Period"). Licensor warrants further that Licensor will not broadcast or transmit the motion picture and will not authorize any other person, firm or corporation to broadcast or transmit the motion picture during the Exclusive Period by wire, cable, community antenna television system or any other means, including "toll, pay or subscription" television within the Broadcast Area (or in Windsor, Ontario).

July 30, 1974 as amended, December 17, 1974—Metro-Goldwyn-Mayer

October 21, 1974—Metro-Goldwyn-Mayer

12. (a) MGM warrants that the Picture will not be telecast or transmitted pursuant to any authorization of MGM over any station whose transmitter is located in the Licensed Territory or in Windsor, Ontario (such areas together being herein called the "Exclusive Territory"), except pursuant hereto during the period commencing on the date hereof and ending on the expiration of the Telecast Period (such period being herein called the "Exclusive Period"); provided, however, that the Exclusive Period for the Picture shall end sixty (60) days after the last permitted telecast thereof and MGM shall be free to license the Picture for telecast by others after the Exclusive Period. MGM further warrants that MGM will not authorize any other person, firm or corporation to transmit the Picture during the Exclusive Period by wire, cable or any other means, including toll, pay or subscription television, to television receivers of the type commonly used in private homes located within the Licensed Territory.

August 22, 1974 as amended, October 17, 1974—Columbia Pictures

10. *Exclusivity.*—(a) Licensor warrants that no film, or any part thereof, or outtakes therefrom, which [illegible] available with the film, will be [illegible] station whose transmitter is located within the Broadcast Area (or Windsor, Ontario), except the Exclusive Period.

(i) The "Exclusive Period" of the films listed in Schedule I of Exhibit A hereto commences on the date hereof and ends on the earlier of the following dates: A date twenty (20) days after the expiration of the applicable Broadcast Period or sixty (60) days after the last broadcast of the applicable film hereunder.

(ii) The "Exclusive Period" of the films listed in Schedule II of Exhibit A hereto shall commence upon the commencement of the applicable Broadcast Period of the individual film (as set forth in Schedule II) and terminate on the earlier of the following dates: A date twenty (20) days after the expiration of the applicable Broadcast Period or a date sixty (60) days after the last broadcast of the applicable film hereunder.

However, in regard to the thirty (30) day period after the Broadcast Period referred to in subparagraph (a) and (b) of the preceding part of this paragraph 16(a), and sixty (60) day period after the last broadcast of the applicable film (referred to in the same subparagraph), the Exclusive Period shall be deemed to those markets in which CBS makes or authorizes delayed broadcasts of the applicable film or films; in other markets Licensor shall have the right to authorize the applicable film for broadcast or transmission. For the purpose of the

foregoing, CBS agrees to advise Licensor, at Licensor's request, of those markets in which delayed broadcasts will or may occur with reasonable promptness after CBS has [illegible] Licensor warrants further that none of the films will be authorized for transmission commencing with the date hereof and continuing thereafter until expiration of the Exclusive Period by wire, cable or any other means to television receivers located within the Broadcast Area.

December 2, 1974 as amended, December 2, 1974—American International Television, Inc.

16. *Exclusivity.*—(a) Licensor warrants that no motion picture will be broadcast or transmitted pursuant to any authorization of Licensor, over any station whose transmitter is located within the Broadcast Area (or in Windsor, Ontario), except pursuant hereto, during the period commencing on the day and year first above written and ending upon the expiration of the Broadcast period applicable to such motion picture or on the day following the last permitted network broadcast (including delayed broadcasts), of such motion picture, whichever date occurs earlier (such period being herein called the "Exclusive Period"). Licensor warrants further that Licensor will not transmit any motion picture hereunder and will not authorize any other person, firm or corporation to transmit any motion picture hereunder during the Exclusive Period by wire, cable or any other means, including "toll, pay or subscription" television, to television receivers located within the Broadcast Area or Windsor, Ontario.

Notwithstanding anything contained in the preceding portion of this subparagraph (a) to the contrary, Licensor shall have the right to license the motion pictures hereunder during the Exclusive Period in the respective Broadcast Areas over any closed circuit television system operating solely within hotels and motels on condition that under the terms of such licensing, the occupant of each separate hotel or motel room is required to pay a separate identifiable charge based upon the number of programs supplied or the number of hours of service provided or that the particular hotel or motel pays a separate and identifiable per-room per-day charge for each room therein for the service provided.

EXCLUSIVITY PROVISIONS OF 1974 THEATRICAL FILM CONTRACTS FOR NBC

May 22, 1974—United Artists Corp., Clauses 3, 4

3. (a) The term of this agreement shall commence on the date of this agreement and shall continue with respect to each [illegible] of the Telecast Term specified in the attached schedule [illegible] days thereafter if requested solely for purposes of so called "delayed telecast" by affiliated NBC television stations. However, none [illegible] be telecast by NBC earlier than the commencement date of the Telecast Term specified in the attached schedule [illegible]

(b) During the term [illegible] of the films shall be exclusive to NBC in the licensed territory in broadcast television, cable and CATV, except [illegible] permanent distribution to passengers of the airlines of NBC [illegible] each film will revert upon the expiration of the Telecast Term [illegible] such film as [illegible] attached schedule.

4. Notwithstanding [illegible] to NBC [illegible] pursuant to paragraph [illegible] of this agreement, UA may license [illegible]:

(i) at any time during the term [illegible] television exhibition solely in hotels and [illegible] ownership or control [illegible] a "complex" is two or more adjoining [illegible] regarded as a single entity or residential community, and solely on condition that the occupant of each separate hotel room, apartment, or abode is required to pay a separate and distinct charge for viewing the film (as distinguished from a blanket charge based on the number of programs supplied or a standard charge based on the hours of service provided); and

(ii) until the earlier of (a) two years prior to the return date for each film or (b) the expiration of the period (presently two years from the initial theatrical

release of the film) specified in Section 76.225(a)(1) of the FCC rules, as such section may be hereafter amended, UA may transmit or authorize the transmission of the film by wire, cable or any other means, where a "per program" or "per channel" charge is made for viewing the film.

May 22, 1971—Warner Bros., Inc.; Clause 4

4. From the date hereof until the expiration of NBC's rights in a picture, said picture will be exclusive to NBC on free television (including cable television, but not exclusive in cable television for which the viewer pays a per program or per channel charge) and, during the Play-Off Period, on over-the-air pay television (in addition to free television) in the licensed territory.

February 5, 1971—United Artists Corp., Clauses 1(c) and 2

(c) During the term each of the films shall be exclusive to NBC in the licensed territory, except for uses expressly permitted pursuant to paragraph 2 of this agreement. NBC's exclusive right to each film will expire upon the expiration of the Telecast Term with respect to such film as provided in the attached schedule.

2. Notwithstanding the exclusivity granted to NBC or restrictions imposed pursuant to paragraph 1 of this agreement, UA may license the film: (i) at any time during the term for closed circuit television exhibition solely in hotels and high-rise residential apartment complexes under common ownership or control, or high-rise residential condominiums (it being understood that a "complex" is two or more adjoining units, originally developed or publicly regarded as a single entity or residential community), and solely on condition that the occupant of each separate hotel room, apartment, or abode is required to pay a separate and distinct charge for viewing the film (as distinguished from a blanket charge based on the number of programs supplied or a standard charge based on the hours of service provided); and (ii) until the earlier of (a) two years prior to the return date for each film or (b) the expiration of the period (presently two years from the initial theatrical release of the film) specified in Section 76.225(a)(1) of the FCC rules, as such section may be hereafter amended, UA may transmit or authorize the transmission of the film by wire, cable or any other means, where a "per program" or "per channel" charge is made for viewing the film.

Nothing contained in this agreement is intended to imply that a CATV system owned by UA shall have any lesser right to carry NBC's broadcast of the film than such system would have had if owned by a third party. The granting by UA to any airline, train or ship of the right to perform or exhibit any of the films hereunder, whether electronically or by means of direct projection, on any flight or trip in the licensed territory to those persons aboard the plane, train or ship shall not be a breach of this agreement.

June 1, 1971—Metro-Goldwyn-Mayer, Clause 1(c)

(c) During the term the pictures shall be exclusive to NBC in free and pay and subscription television in the licensed territory except for the following: Licensor may license each picture for exhibition in the licensed territory by pay television (i.e. where a per-program charge is made for viewing the picture or the subscriber pays a separate per-channel charge for the channel where the picture is being shown), provided no such pay television exhibition occurs during the period commencing 60 days prior to the availability date of the picture specified in the attached schedule and ending with the expiration of the telecast term of such picture.

January 16, 1971—Metro-Goldwyn-Mayer, Clause 1(c)

(c) During the term the pictures shall be exclusive to NBC in free and pay and subscription television in the licensed territory except for the following: Licensor may license each picture for exhibition in the licensed territory by pay television (i.e. where a per-program charge is made for viewing the picture), provided no such pay television exhibition occurs during the period commencing 60 days prior to the availability date of the picture specified in the attached schedule and ending with the expiration of the telecast term of such picture.

February 8, 1974—American International Television, Inc., Clause 1(a)

1. (a) Licensor does hereby grant to NBC during the term hereof the sole and exclusive license to telecast on free television (including community antenna systems, but not pay television) on a national network basis the motion pictures specified in the schedule attached hereto (hereinafter called "the pictures", which term shall refer to one picture if only one picture is designated in the schedule) within the United States, its territories and possessions including Puerto Rico (herein called the "licensed territory") for the number of runs specified in the attached schedule. During the term the pictures shall be exclusive to NBC in free and pay television in the licensed territory, and in Windsor, Ontario, and as to English language broadcast in Tijuana, Mexico, (and the pictures shall not be broadcast from any transmitter located elsewhere in Canada or Mexico (in English language only) which is capable of placing a signal in any portion of Detroit, Michigan, or San Diego, California, sufficient to provide at least "Grade B service", as that term is defined and calculated in the Rules and Regulations of the Federal Communications Commission), except that licensor reserves the right to license the film for hotel, condominiums and high rise apartment exhibition on paid television systems that require a per channel or per program charge for reception of the film. The term hereof shall commence on the date hereof and shall continue as to each picture until the expiration of the telecast term specified in the attached schedule or the last authorized telecast of the picture (including 60 days delayed telecast), whichever is earlier; provided, however, that no picture shall be telecast hereunder earlier than the commencement date of the telecast term therefor specified in the attached schedule.

November 25, 1974—Cinema Center Films, Part of Clause 1(a)

During the term, the picture shall be exclusive to NBC in free television in the licensed territory and in Windsor, Ontario and for English language broadcasts in Tijuana, Mexico. The picture was theatrically released more than two (2) years prior to the commencement of the term hereof and, therefore, Licensor has elected not to make the picture available for exhibition in pay television during the term.

November 21, 1974—Emerson Film Enterprises, Inc., Clause 1(a)

Each picture shall be exclusive to NBC in free and pay television (including wireless, cable and CATV transmission), as hereinafter specified. During the period from the date of this agreement until the expiration of NBC's rights in a picture, the picture will be exclusive to NBC in free and pay television in the licensed territory, except that with respect solely to pay television where a "per-program" or "per-channel" charge is made for viewing the picture. Licensor may license the picture for broadcast before the earlier of either (i) sixty (60) days prior to the commencement of the telecast term specified in the attached schedule or (ii) the expiration of the period specified in Sec. 76.225(a)(1) of the FCC rules, (i.e. currently 2 years from initial theatrical release of the picture).

December 2, 1974—Viacom International, Inc., Clause 1(a)

Each picture shall be exclusive to NBC in free and pay television (including wireless, cable and CATV transmission), as hereinafter specified. During the period from the date of this agreement until the expiration of NBC's rights in a picture, the picture will be exclusive to NBC in free and pay television in the licensed territory, except that with respect solely to pay television where a "per-program" or "per-channel" charge is made for viewing the picture, Licensor may license the picture for broadcast before the earlier of either (i) sixty (60) days prior to the commencement of the telecast term specified in the attached schedule or (ii) the expiration of the period specified in Sec. 76.225(a)(1) of the FCC rules, (i.e. currently 2 years from initial theatrical release of the picture).

CONSUMERS UNION / A NONPROFIT ORGANIZATION / PUBLISHER OF CONSUMER REPORTS

February 28, 1977

Mr. Bernard M. Hollander, Chief
Judgements and Judgement Enforcement Section
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Hollander:

Consumers Union (CU) and Consumer Federation of America (CFA) wish to express our concern over, and opposition to, the provision in the proposed NBC/Justice Department Consent Decree that would grant NBC the right to obtain contractual exclusivity on motion pictures for an unreasonably long period.

Our understanding is that this provision would allow NBC to obtain exclusive rights to a motion picture for a period of 30 days before the picture's availability date and for 24 additional months covering the first two runs of the picture plus 12 months for each contracted subsequent run. This arrangement -- which is not related to the actual exhibition date -- essentially forecloses the availability of a picture to other forms of television, i.e., pay cable and subscription. We find such foreclosure to be anticompetitive and not in the best interest of the consumer and a free marketplace economy.

We believe that the Justice Department's endorsement of this restraint of trade is inappropriate, given the stated intention of the House of Representative's Communications Subcommittee to examine and reevaluate the entire Communications Act of 1934. Justice Department action risks weakening the possibility of obtaining redress against exclusivity practices of this kind in other forums, such as the Congress, the FCC and in the courts.

Our interest in the Justice Department's action is contained in CFA's Communications Policy Resolutions, approved by its membership (over 200 national, state and local non-profit organizations) on February 12, 1977. It states in part:

> "CFA recognizes that consumers have a major stake in the technologies and issues...both because the public has the right to choose from and have access to a variety of high quality communications services at reasonable costs and because the public is dependent upon telecommunications for accurate treatment and fair reporting of the many diverse and complex issues in today's society."

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We believe that cable television has, in the main, fallen short in fostering diversity in programming. For instance, we are unaware of any significant cable or pay TV program designed to serve the information needs of consumers. Cable television's failure to develop a strong public service component to its programming would appear to us to be further hindered by sanctioning broadcast industry practices that potentially deprive cable of developing a viable economic base. Our concern, therefore, is that the government not inhibit the cable industry from developing the economic base to deliver the full public service potential promised but thus far not delivered.

We, therefore, believe that a Consent Decree provision with the potential of inhibiting the growth of cable or pay TV in this country is contrary to the best interests of all Americans. We urge the Justice Department to withdraw its Consent to this Decree and seek one that promotes and safeguards competition in our broadcast/cable industries.

CU and CFA have not focused on the other provisions of the Consent Decree and are offering no comment on them at this time.

Very truly yours,

Warren Braren

Warren Braren
Associate Director
and
Chairperson, CFA
Communications Policy Committee

WB/lk

cc Rhoda H. Karpatkin
Executive Director, CU

Kathleen O'Reilly
Executive Director, CFA

TELEPHONE
CABLE

UNITED STATES CONFERENCE OF MAYORS
1620 EYE STREET, NORTHWEST
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Mayor of Detroit
Executive Director
John J. Gunther

February 28, 1977

Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Antitrust Division
Washington, D. C. 20530

Re: United States v. NBC

Dear Mr. Hollander:

The U.S. Conference of Mayors, an organization representing the nation's 750 cities over 30,000 population, is writing in opposition to the provisions in the proposed NBC/Justice Department Consent Decree permitting NBC to continue its practice of obtaining contractual exclusivity against pay cable television on feature films.

Pay cable television is a new home entertainment service which is being made available to more than a million cable subscribers in approximately 410 towns and cities throughout the nation. According to cable developers, it is the added revenue base generated by pay cable television programming that can provide the economic stimulus for the expansion of cable telecommunications into our major urban communities.

The proposed Consent Decree granting NBC the right to withhold motion picture products from the pay cable industry would deprive the pay cable industry of essential programming it must have in order to attract urban customers. The cost of building urban cable systems can go as high as $10,000 per mile. Without access to movies upon which to build a stable economic base, cable operators and investors are reluctant to venture into urban markets. Cable television with the economic incentive provided by pay cable subscribers can bring to all city residents the many advantages offered by a broadband communications service.

Furthermore, without motion picture product to attract large audiences, the cable industry would be denied the opportunity to broaden its programming horizons into the areas of cultural, children's, and minority interest programming that is often lacking on commercial television and regrettably inaccessible to many elderly and disadvantaged citizens in our urban centers.

The U.S. Conference of Mayors has long championed free competition in the marketplace of ideas as well as in the economic marketplace. The pay cable industry is an emerging home entertainment service that is struggling to compete with the major networks that have access today to over 74 million TV homes. It is blatantly anti-competitive to deny the pay cable industry its right to compete with an oligopolistic broadcast industry that generates over a billion dollars in revenues while enjoying free use of the public airwaves.

The U.S. Conference of Mayors is aware that our commercial TV system is the finest in the world. Yet, we also recognize that free competition is a fundamental principle of our society that should be nourished rather than stifled. In testimony before the Federal Communications Commission, we have stated that pay cable television will not supplant our commercial system, but will supplement it by offering greater diversity and freedom of choice.

It is indeed ironic that a Consent Decree which was brought to open the doors of competition in the program producing industry would slam these doors shut on the pay cable industry. It is fair to ask why NBC chooses to seek contractual exclusivity only against pay cable television and not against other means of motion picture distribution including in-flight exhibition, hotel exhibition, theatrical exhibition, and cassettes and video-discs. Surely, these modes of exhibition generate audiences larger than the pay cable industry. Yet, the decree would endorse NBC's discriminatory practices. We believe the Justice Department should carefully examine whether it has become a party to NBC's efforts to foreclose competition in the home entertainment industry. The need for a thorough examination becomes even more apparent when it is pointed out that NBC's parent company, RCA, is investing in the development of video-disc home movies against which NBC does not feel compelled to obtain contractual exclusivity.

The major concern of the U.S. Confernece of Mayors is identifying what is in the public interest in this case. Our concerns include those citizens who are cable subscribers as well as those who are not. We have testified before the FCC that the unrestricted growth and development of pay cable television will not injure the rights of those citizens who enjoy commercial television. We firmly believe that it is the consumer who should have the ultimate right to choose the form and the manner in which he receives and views entertainment in his home.

Bernard M. Hollander, Chief
February 28, 1977
Page three

TV sets are paid for by the individual. They are not the property of the Networks, the advertisers, nor the pay cable industry. Therefore, the role of the government should be to protect and preserve the right of the individual to exercise his basic freedoms. The Consent Decree, as it is written, makes the government a party to an unreasonable and unwarranted infringement on the right of all citizens to freely exercise their preferences im deciding how and in what form they shall view movies.

The Justice Department initially proposed a formula that would have limited network exclusivity to no more than 45 days prior and 45 days after a network telecast. Clearly, that solution would have better safeguarded the public interest and fostered greater competition. Unfortunately, the Department acceded to NBC's demands for far broader exclusivity. There is the distressing prospect -- presently unanswered -- that the Justice Department sacrificed the interests of the pay cable industry in order to obtain an overall agreement with NBC.

The U.S. Conference of Mayors believes that the Decree is not in the public interest and is contrary to the mandate of our antitrust laws. We urge the Justice Department either to withdraw the provision in the decree affecting pay cable television or negotiate relief that will serve the public interest and preserve our free market society.

Sincerely,

John J. Gunther
Executive Director

MEDIA ACCESS PROJECT

February 28, 1977

Bernard M. Hollander, Chief
Judgments and Judgment Enforcement Section
Anti-Trust Division, Department of Justice
Washington, D.C. 20530

Dear Mr. Hollander:

This letter is being written on behalf of the Committee for Open Media (COM) (San Jose, California), the Mexican-American Legal Defense Fund (MALDF) (Washington, D.C.) and the National Newspaper Publishers Association (NNPA) (Washington, D.C.) in connection with the Justice Department's proposed consent decree with the National Broadcasting Company. COM, MALDF, and NNPA are concerned with the aspect of the settlement which relates to certain protections afforded the National Broadcasting Company's scheduling of motion pictures on television.

If one were consciously to attempt to undermine the viability of subscription and pay cable television today, one would not be likely to find an easier or more effective method than by enforcing the exclusivity provision in the proposed consent decree between the National Broadcasting Company (NBC) and the Department of Justice.

Still in a nascent and highly vulnerable stage of development, the cable television industry relies heavily upon its power to attract and to retain new subscribers. 1/ While cable television has achieved its greatest success in rural areas, which might typically be served by only one or two distant stations, its attempts to attract support in the major cities has often been frustrated by the plethora of traditional-type programs offered by the more familiar networks.

As most cable operators agree, however, this barrier is not insurmountable. Indeed, perhaps the most promising development in this new and exciting area of broadcasting is pay cable service, which allows a cable subscriber to enjoy, for a few extra dollars each month, first-run movies and sporting events. Such programs are presented on special channels, unedited and without commercial interruption.

1/ "Future of Cable TV: The Future Brightens", New York Times, February 21, 1976.

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The monies so received, in turn, make possible the variety of cultural and special interest programming that currently distinguishes cable from major network television, the former employing a type of programming that has almost infinite ramifications for those seeking to advance the interests of hitherto underrepresented minorities in this country.

Under the terms of the consent decree's proposed exclusivity provision, a well-established station, such as NBC, could conceivably condition its purchase of a first-run movie upon the producer's promise not to distribute that particular film to cable television during the month preceding and the two years following the film's designated availability date.

We urge that the contractual exclusivity provision be eliminated. Its gross unfairness to cable television and undue protectiveness towards major network interests are clearly inconsistent with, if not totally antithetical to, the concept of cultural diversity in television programming.

That the proposed contractual exclusivity clause--and a fortiori, the option to renew--would firmly reinforce major networks' clear dominance over cable TV in still one more area of programming, i.e., films, is self-evident. 1/ Less obvious, but at least equally disturbing, are the implications of exclusivity for the possibility of providing meaningful access to the media in the foreseeable future for the less visible, often less powerful, minority peoples of this country.

A complete list of the ways in which cable television could advance minority interests is obviously impossible to generate at this time. However, we believe that cable television represents one of the most promising and feasible methods by which important needs of the minority community are being and can continue, in increasing measure, to be met. 2/

1/ The networks currently have access to 74 million TV homes. According to their own estimates, network revenues are expected to reach $13 billion by 1985. These figures are in sharp contrast to the 12.5 million subscribers of cable television today.

2/ According to Alex Mendaris, Director of the Office of Minority Business enterprise, who testified in the recent FCC hearings to relax restrictions on cable television, there were four minority cable systems on the air, with another one under construction at the time of the hearings. A total of 23 minority firms held franchises, and a substantial number of other minority corporate groups were then forming to seek additional franchises.

Over 11 million minorities are currently concentrated in the 25 major markets of this country. In light of the frequently high costs of attending cinematic, dramatic, educational, musical, or other cultural events in larger cities today, pay cablecasting offers the opportunity for such groups to share some of the events that are unique to urban life, but which would nevertheless remain largely unavailable to them otherwise. Payment of the typical cable charge of less than $8.00 per month, which is less than the cost of a single family trip to the movies, would broaden the cultural options open to poor immeasurably. Cablecasting represents one way in which the broadcast media might allow the indigent to avoid the prohibitive costs of travel and admission, but still benefit from the advantages of living in a major city. In a very real sense, cable television would permit poor and minority peoples to escape the immediacy of their circumstances and to partake in some of the best forms of cultural enrichment that American society can offer.

Cable television's relatively limited audience size, a serious weakness insofar as subsidization is concerned, could be turned to significant advantage by maximizing upon the greater amounts of flexibility and special interest programming that it allows.

More minority participation at top-levels of decision-making as well as additional minority-operated stations would go a long way towards augmenting broadcaster sensitivity to local needs. A greater receptivity to local talent would provide an important outlet for the self-expression of heretofore unrecognized filmmakers, producers, and artists, thereby contributing to greater minority employment as well. The familiar problems of inadequate local news coverage too could be alleviated. Even the needs of small communities where a foreign language is predominant could be met through cablecasting.

The possibilities in this area are limitless. But before such innovative and important programs can be realized, cable television must be afforded the opportunity to achieve a small measure of economic security. The presentation of high quality feature films as part of pay cable service plays a key role in generating support for the continuation of cable television.

Legitimization of NBC's proposed exclusivity clause would not only perpetuate the monopoly of television entertainment enjoyed by the major networks today, but would dash the hopes for soon achieveing the cultural diversity that is so sorely needed in this industry. This opportunity for bold innovation should not be lost. The proposal of contractual exclusivity should be eliminated.

Yours truly,

Harvey J. Shulman
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1912 N Street, N.W.
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Counsel for COM, MALDF, NNPA

Of Counsel:

Edward Leong
Law Student Intern
University of Pennsylvania Law School

Cable Television

March 1, 1977

Mr. Bernard M. Hollander, Chief
Judgements and Judgement
Enforcement Section
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

Dear Mr. Hollander:

The undersigned, certain members of the staff of the Cable Television Information Center of The Urban Institute, hereby submit comments on the proposed consent decree in the case of United States v. National Broadcasting Company, Inc., Civil No. 74-3601-RJK, which was filed November 17, 1976 in the United States District Court for the Central District of California.

These comments reflect the views of the undersigned. They are not the views of the Cable Television Information Center of The Urban Institute, nor of the sources of its financial support.

Under section VI (E) (iii) (e) of the proposed consent decree, the Department of Justice would give its approval to NBC's acquisition of exclusive exhibition rights to first run motion pictures as against subscription and pay cable television. The period of exclusivity allowed under the proposed decree may extend up to 24 months for two broadcast showings and an additional 12 months for each exhibition greater than two. Thus, NBC may acquire the exclusive right to exhibit a film three times and thus preclude the showing of that film on subscription or pay cable television for three years. This period of exclusivity, combined with the Federal Communications Commission's current rules regarding the exhibition of feature films on pay cable, 47 C.F.R. § 76.225 (a), could effectively foreclose pay cable from exhibiting certain movies for at least ten years and possibly longer.

This provision of the consent decree is not in the public interest. The American people should be given an increased - as opposed to decreased - range of choices as to how they may view entertainment programming. The effect of the consent decree may be to totally preempt one of those choices -- pay cable. Such an effect is anticompetitive and should not be sanctioned by the Department of Justice.

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It is instructive to recall the Department's own statements regarding the need for competition between broadcast and cable interests:

> The public has vital interests which are not necessarily coextensive with those of the broadcasters or CATV operators.... The public's interest includes securing a broad diversity of information, viewpoints and entertainment. We look to competition to provide this type of diversity.... Where private agreement resolves the parties' differences by sacrificing actual or potential competition the public interest in competition may be fatally compromised. Comments of the United States Department of Justice in FCC Docket 18397 at pages 3-4 Sept. 8, 1969).

Thus, what the Justice Department condemned by private action it now condones in the proposed consent decree.

Apparently, part of the reasoning behind sanctioning such exclusive contracts is that it limits NBC to the type of contractual arrangements which are currently being negotiated. That may be so, but we believe it is unwise and unnecessary for the Justice Department to sanction such practices. The Department has already observed that if the broadcasters agreed among themselves not to purchase movies from sellers who did not agree to exclusive contracts, a per se violation of the antitrust laws would be involved. (Brief for United States of America in Home Box Office v. Federal Communications Commission, p. 19, Nos. 75-1280, et al., (D.C. Cir.). Yet, if the proposed consent decree becomes effective, that type of practice would be difficult to challenge because of express Justice Department approval. As such, remedial action by the courts or by legislation may be effectively precluded.

The Justice Department states in its Competitive Impact Statement that the proposed provision should "eliminate any possibility that NBC can 'warehouse' feature films for a number of years before exhibiting them on network television..." p. 20. However, by allowing the exclusivity period to run from the date of the program's first availability, the Department has sanctioned a procedure which in fact invites warehousing. For example, NBC and a program supplier could agree to a contract whereby NBC would exhibit a motion picture three times over a three year period. According to the consent decree provision, NBC could get 36 months of exclusivity protection for that motion picture. Assume that the supplier and NBC agree to an availability date of January 1, 1977. NBC will have to exhibit the film twice by December 31, 1978, and once again by the end of 1979. NBC could effectively warehouse the film for a year and a half by not broadcasting it until July 1, 1978 and re-running it December 31, 1978.

Mr. Bernard M. Hollander
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If, on the other hand, the exclusivity date were based upon the date of exhibition the network would receive exclusivity protection only at those times directly before and after the broadcast. The warehousing problem would be foreclosed. Thus, the key to any exclusivity provision should be the date of exhibition, not the date of availability.

Another matter which we believe to be incorrectly decided is the period of time for which exclusivity may be obtained. A two year period, regardless of the date from which it is calculated, is simply too long a time to foreclose a film's access to pay television. More importantly, it is too long a time to prevent the public from viewing entertainment programming via the medium of their choice. Furthermore, there appears to be no evidence to suggest that a broadcast exhibition of a film has ever been adversely affected by a prior pay cable exhibition. Indeed, it is difficult to imagine how a contemporaneous showing could adversely affect the networks when only 1,000,000 homes receive pay cable programming compared to the 80,000,000 homes which view over the air programming.

We believe the Department should return to its initial thinking on this matter. Forty-five days of exclusivity on either side of network exhibition affords ample protection to NBC. This was the Justice Department's initial determination, and it should be adhered to. A 90 day period of exclusivity would afford pay cable subscribers greater opportunity to choose freely the method of viewing which they prefer.

In our opinion, the provision currently proposed is an unreasonable intrusion on competition and the public's freedom of choice. A provision should be adopted which sufficiently limits the duration of allowable exclusivity protection and which computes the exclusivity period from the date of network exhibition. If such a provision cannot be agreed to, it would be better to have no provision at all. No provision is much more acceptable than an unjust provision.

Initially, exclusivity as against pay cable, the subject matter of Section VI (E) (iii) (e), was peripheral to the thrust of the Justice Department's complaint against NBC. This provision is relevant in only the very broadest sense to the purpose of the lawsuit. There is, therefore, no compelling reason to treat the subject in the decree. Its inclusion will have the effect of condoning anticompetitive practices, not halting them. In other words, the net result will be a lessening of competition not an increase thereof; as compared with the situation that prevailed before the complaint was filed with respect to pay cable, network dominance will be furthered, not slowed.

The provision contained in the proposed decree, when considered in conjunction with the FCC's pay cable rules, may operate to exclude a feature film's availability from pay cable for a period of ten years or more. The FCC's cable

Mr. Bernard M. Hollander
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rules allow pay cable operators to exhibit feature films during the first three years of their release. After this three year period, films are not available to pay cable from the third through the tenth year of their release unless the film is under contract and available for exhibition by a network or television station in the market in which the pay cable operator wishes to show it. 47 C.F.R. § 76.225 (a) (1) (ii). This rule, combined with the Justice Department's stamp of approval on exclusive contracts, may act to foreclose completely a film's availability to pay cable. Films not under contract and available for exhibition in a particular market may not be shown over pay cable due to the operation of FCC regulations. Films which are available in a local market will be rendered unavailable to pay cable by virtue of the contractual exclusivity permitted by the consent decree.

While this is obviously not the proper forum to argue the merits of the FCC's cable rules, they must be considered by the Justice Department because the combined effects of the rules and the consent decree are so blatantly inequitable. Considered together, the FCC's rules and the consent decree effectively preempt the right of choice of 1,000,000 pay cable subscribers to the benefit of no one.

In summary, we urge the Justice Department to withdraw its approval from the current pay cable exclusivity provision embodied in the NBC consent decree. Instead, we support the inclusion of a provision similar to the one initially proposed by the Department which allows 45 day exclusivity on either side of the exhibition date. If such a provision cannot reasonably be included in the consent decree, the subject of exclusivity as against pay cable should not be included in the decree.

Respectfully submitted,

Henry de Castillo

Stanley Greenberg

Susan C. Green

Harold L. Horn

Sheila Mahony

Michael A. McGregor

COMMENTS WITH RESPECT TO PROPOSED FINAL JUDGMENT IN UNITED STATES OF AMERICA v. NATIONAL BROADCASTING COMPANY, INC., CIVIL NO. 74-3601-RJK, U.S.D.C., C.D. Cal.

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COMMENTS OF UNITED ARTISTS CORPORATION AND METRO-GOLDWYN-MAYER INC. WITH RESPECT TO PROPOSED FINAL JUDGMENT IN UNITED STATES OF AMERICA V. NATIONAL BROADCASTING COMPANY, INC., CIVIL NO. 74-3601-RJK, U.S.D.C., C.D. Cal.

These comments are submitted to the Department of Justice pursuant to the provisions of Sections 2(b) - (h) of the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §16(b) - (h), by United Artists Corporation ("United Artists") and Metro-Goldwyn-Mayer Inc. ("MGM"). United Artists is a distributor of theatrical feature films.* MGM is a producer and distributor of theatrical feature films. Both companies distribute theatrical feature films for television exhibition.

The Proposed Decree Contains No Restrictions On NBC's Production Of Theatrical Feature Films

The proposed consent decree contains no restrictions on NBC's power to produce theatrical feature films. The Competitive Impact Statement confirms that NBC uses its control over access to its network "to control the prices paid by NBC for television exhibition rights to motion picture feature films and to obtain competitive advantages over other [illegible] and distributors of ... motion picture feature [illegible]."* Despite the government's recognition of the problem, the proposed decree does nothing to prevent NBC from producing theatrical feature films whenever it chooses.

The decree's "hours limitation" permits almost unlimited production by NBC of theatrical features. For instance, since the proposed decree permits NBC to exhibit a full 2 1/2 hours of NBC produced entertainment programming in prime time each week, NBC could theoretically produce 52 feature films each year and, subsequent to their theatrical exhibition, play them off one week at a time in prime time on the network.

The motion picture industry depends greatly on revenues from television exhibition of theatrical features. The fact that there are only three buyers for the first run television exhibition of theatrical feature films -- the three networks -- gives the networks unfair leverage in purchasing. The Department of Justice has recognized that such network power becomes patently anticompetitive when "... the network,

* Motion pictures which are initially exhibited in theatres and only subsequently exhibited on television.

* Competitive Impact Statement, p. 2.

through its production of entertainment programs, is in competition with outside suppliers for exhibition on its own network and that [the network] could, at any time, by unilateral decision, pre-empt all the available time on its network."*

The government, having made this accurate observation, should not now be willing to settle for a decree which gives NBC the unrestricted power to make theatrical feature films. Under the decree, NBC could fill one entire evening of prime time per week with an NBC theatrical feature film. Since the number of theatrical features shown on television has decreased, this one motion picture per week could effectively pre-empt independent producers of motion pictures from having their product shown in prime time on the NBC network.

In addition, unless its ability to make theatrical feature films is restricted, NBC will continue to use the threat of internal production to keep the prices it pays outside suppliers at an artificially low level. When ABC

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* Page 8 of Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims filed January 19, 1976 in United States v. National Broadcasting Company, Inc., 74-3601-RJK, U.S.D.C., C.D., Cal.

and CBS entered into the production of theatrical feature films in the late 1960's, all three networks were able to suppress the price they paid other producers and distributors of motion pictures. Further, the leverage of "if you won't take our price, we'll produce it ourselves" allowed the networks to maintain the price at a level wholly unrelated to soaring costs or the natural laws of a competitive marketplace. All three networks offered the almost identical low price for the exhibition of a non-network produced motion picture. This price remained the same for several years. The producers and distributors of motion pictures had no alternative if they wanted to exhibit their films on television. They were compelled to take what the networks offered.

Allowing NBC to produce its own theatrical feature films injures competition in a variety of other ways. NBC could produce low quality theatrical feature films, expecting that any losses in theatrical exhibition would be recouped by exhibition on its own network. Also, NBC could spend vast amounts of money on a film because its prime time exhibition on NBC is guaranteed. Such expenditures would artificially force up the costs of production to outside suppliers.

The failure of the proposed decree to place any restrictions on NBC's internal production of theatrical feature films demonstrates the ineffectiveness of the so-called "hours limitation" on NBC produced programming. It also reveals that the decree provides no meaningful relief with respect to "long form" programming. For this reason, the proposed judgment should be withdrawn.

The Provisions Of The Proposed Decree With Respect To Network Exclusivity Over Pay Cable Provide No Meaningful Relief

Section VI(E)(iii)(e) of the proposed decree provides that for 15 years, for theatrical feature films which NBC has licensed to show on the NBC network, NBC cannot acquire exclusive exhibition rights against

> "pay or subscription television, via cable or any other means, where a per-program or per-channel charge is made to the viewer, except that NBC may acquire exclusive rights to any such feature film commencing thirty (30) days prior to the first date and extending until the last date on which NBC may broadcast such feature film under the contract between NBC and such supplier, so long as this period of exclusivity between the first and last dates on which NBC may broadcast such feature film under such contract does not exceed twenty-four (24) months, and does not exceed twelve (12) additional months for each exhibition greater than two (2) to which NBC acquires the exhibition rights" (emphasis supplied).

This provision merely codifies NBC's present contract exclusivity rights, which prevent the exhibition on pay cable of theatrical feature films licensed to NBC. The government's Competitive Impact Statement recognized the injustice of this practice by noting that the action against NBC was initiated because

"despite the FCC financial interest and syndication rules, NBC and the other networks continued to exact from producers such rights as ... exclusive use of [theatrical feature films] by NBC as against other communications markets."* Accordingly, NBC should not be permitted to acquire any exclusive rights with regard to pay or subscription television.

Under the proposed decree, NBC's exclusivity over pay cable may begin thirty (30) days prior to the date on which the license agreement permits NBC to broadcast the film. At the very least, any such exclusivity should be limited to begin no earlier than thirty (30) days prior to the scheduled showing of the film.

The decree gives NBC two years' of exclusivity over pay cable. Any exclusive rights should terminate thirty (30) days after the film has been shown on the network.

The proposed decree would merely put the court's stamp of approval on NBC's present trade practices in connection with exclusivity over pay cable. This is a further reason for withdrawal of the proposed decree.

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* Competitive Impact Statement, p.5.

Dated: New York, New York
March 1, 1977

Respectfully submitted,

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Non-sensa
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Mr Kaplan
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Mr Seidy

United States Senate

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON SEPARATION OF POWERS
(PURSUANT TO S. RES. 72, SEC. 14, 94TH CONGRESS)
WASHINGTON, D.C. 20510

Mr Baker

March 1, 1977

RECEIVED

Donald I. Baker
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Dear Mr. Baker:

My purpose in writing is to file comments pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act on the proposed consent decree in U.S. v. NBC, Civil Action No. 74-3601-RJK, which is pending in the U.S. District Court for the Central District of California.

This proposed consent decree would in part permit NBC to acquire exclusive exhibition rights to feature films against pay cable TV for a 24-month period for two exhibitions, and for twelve additional months for each additional exhibition. NBC would also be entitled to demand exclusivity for 30 days prior to the 24-month period. My comments assume that the department would be willing to settle the companion suits against CBS and ABC on similar terms, at least insofar as exclusivity against pay cable is concerned.

In my judgment, the Department of Justice is making a grave error in granting its imprimatur to the network practice of obtaining exclusivity against pay cable television for the exhibition of feature films. I believe that the position taken by the Antitrust Division in the proposed consent decree is inconsistent with, and contrary to, the department's comments filed with the Federal Communications Commission and the entire thrust of your own testimony before the Senate Antitrust and Monopoly Subcommittee in July of 1975.

In this proposed consent decree, the Department of Justice has completely ignored the existence of the Federal Communications Commission's rules as set forth in the Commission's first Report and Order, Docket No. 19554, adopted March 20, 1975. Those rules may be summarized as follows: a pay cable operator may have access to a feature film for three years after its

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ANTITRUST

theatrical release date. Afther the third year, pay cable may have access only if a network or a boradcaster holds a present contractual right to exhibit the film. A pay cable operator may have access to films which are more than 10 years old only if the film has not been exhibited in his market by a broadcaster during the preceeding three-year period. The department seems to have forgotten that it opposed the adoption of these rules in Docket No. 19554. In its original comments the department concluded as follows:

> "... (1) there were insufficient evidence to support a finding that programming restrictions on pay cable were in the public intrest as defined in the Communications Act of 1934, (2) the imposition of onerous programming restrictions upon cable would preclude it from developing into a medium capable of increasing the diversity of this nation's communications system and (3) that the Commission should free pay cable from the various programming restrictions then imposed upon it in order to avail itself of an opportunity to obtain empirical evidence as to whether any type of programming restrictions were, in fact, necessary to protect the public interest."

The subcommittee hearings on the exclusivity provisions of the contracts between the networks and motion picture producers established the following points to my satisfaction: first, to induce sonsumers to subscribe and to become economically viable, cable television needs some programming with mass appeal. Thus, if cable is ever going to compete with the networks and broadcasters, feature films and sports are crucial to its development. Second, the combination of the FCC rules and the contractual arrangements between motion picture producers and the networks has the effect of denying pay cable any reasonable access to feature films until they are at least 10 years old. Practically speaking, pay cable can only license those feature films not available for telecast by the networks, for the limited period between the end of their run in the theaters and before the third year. Third, it is the networks, not the motion picture producers, who insist upon exclusivity during the contract negotiations. During the hearings, the motion picture producers testified they would prefer to license the exhibition of feature films sequentially to all three mediums: first, the theaters, then pay cable, and finally, commercial television. Fourth, the networks are able to insist upon exclusivity because of the same monopoly power in the prime-time television market of which the department complains. Indeed, paragraph 16 of the Justice Department complaint against NBC alleges that the defendant "has

monopolized the trade and commerce in the television entertainment programs exhibited on the NBC television network during prime-time evening hours." In effect, the networks use their monopoly power in advertiser-subscribed, over-the-air television to suppress the development of a competing technology, namely pay cable. The Department of Justice chastised the FCC on precisely these grounds in Docket No. 19554.

> ... Rather than protecting one form of communication against another, the proper role of the Commission is to allow each method of communications an opportunity to develop in a manner which will meet diversified needs of the American public.

Now, the Department proposes to become a formal party to a dual set of restraints.

The terms of the proposed consent decree will permit NBC to super-impose the private restraints complained of during the hearings on top of those already mandated by the FCC. NBC will be able to bar pay cable from showing any feature film for 10 years simply by purchasing the rights to exhibit it for the three-year period after the date of theatrical release. After the first three years, the FCC rule comes into play and pay cable will be precluded from licensing that film for the next seven. In a similar fashion pay cable will be banned from exhibiting all films which are between three and 10 years old. Those films will be denied to pay cable either by the FCC rule or by private contract. The Department of Justice by this consent decree, proposes to sanctify an arrangement whereby NBC and presumably the other networks can completely stifle the potential development of a competing medium.

The proposed consent decree should contain language expressly prohibiting NBC from purchasing the rights to exhibit feature films on terms which exclude pay cable as long as the FCC rules are in effect. The networks and the broadcasters should not be able to supplement the FCC's public restraints with private restraints of their own. It is clear the FCC did not envision these private, contractual restraints being imposed when it promulgated its rules for films between three and 10 years old:

> "The second situation in which a feature film will be available for subscription use is when the film is available for telecast by a conventional broadcast station located in the market of the subscription station or cable system. When a film becomes available for conventional television exhibition the issue of program siphoning disappears, as does the need for anti-siphoning restrictions. In such a situation, the public interest

> in receiving a film over conventional television has been realized and there is no longer any justification for restricting the exhibition of the film by subscription television. Since the public is able to view the film over conventional television at no charge, those who choose to pay a special fee to view the film over subscription television should not be prevented from doing so by our rules."

Even if there were no FCC rules, the exclusivity proposed in the proposed consent decree is unduly restrictive. In the absence of any rules, exclusivity for a period of 90 days prior to the play date would be sufficient to protect the value of the exhibition right which the network has purchased. In order to give NBC scheduling flexibility, language could be included permitting the network to extend the exclusivity period for an additional 90 days if the play date had to be changed. These provisions would be reasonable if there were no FCC rules. However, since we have the rules, and since NBC and the other networks benefit by their existence, they should have to live with them. In sum, no private exclusivity should be permitted. In the event NBC and other networks will not agree to these terms, the cases should be litigated to their conclusion.

Respectfully submitted,

James Abourezk
United States Senator

to divulging such material in any legal proceeding (other than a Grand Jury proceeding) to which that defendant is not a party.

IX

[*Retention of Jurisdiction*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification of any of the provisions thereof and for the enforcement of compliance therewith and for the punishment of any violation thereof.

X

Entry of this Final Judgment is in the public interest.

Proposed Consent Decree

[¶ 50,292]

United States v. National Broadcasting Co., Inc.

U. S. District Court, Central District of California. Civil Action No. 74-3603-RJK. Filed, but not entered, November 17, 1976.

Case No. 2424, Antitrust Division, Department of Justice.

For plaintiff: Donald I. Baker, Asst. Atty. Gen., William E. Swope, Charles F. B. McAleer, Bernard M. Hollander, Barry J. Kaplan, Bernard J. O'Reilly, George W. Selby, Kevin R. Sullivan, and Polly L. Frenkel, Attys., Dept. of Justice. **For defendant:** Bernard G. Segal, Jerome J. Shestack, and Peter S. Greenberg, of Schnader, Harrison, Segal & Lewis, Corydon B. Dunham, Vice Pres., National Broadcasting Co., Inc.

Proposed Final Judgment

[*Proposed final judgment*] Plaintiff, United States of America, having filed its complaint herein on December 10, 1974, and defendant, National Broadcasting Company, Inc., having filed its answer herein on December 30, 1974, by their respective attorneys, each having consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding;

Now, Therefore, before any testimony has been taken, the Court being advised and having considered the matter, it is hereby:

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against defendant under the provisions of Sections 1 and 2 of the Act of Congress of July 2, 1890, 15 U. S. C. §§ 1, 2, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" means an individual, partnership, corporation or any other form of legal or business entity.

(B) "NBC" means the National Broadcasting Company, Inc. and its subsidiaries.

(C) A "person controlling NBC" means any person owning at least ten percent (10%) of, or a controlling share of, the outstanding voting stock of NBC.

(D) "NBC Television Network" means an NBC owned or operated business which provides television programs and related advertising messages to affiliated television broadcast stations.

(E) "Entertainment Program" means any program, including a feature film, exhibited or intended to be exhibited on television other than the following programs: news, public affairs, agricultural, religious, instructional, and sports (as those terms are defined in Appendix A to this Final Judgment). The inclusion of incidental or occasional entertainment or non-entertainment elements in a program or program series shall not be deemed to change the classification of the program or program series.

(F) "Independent Program Supplier" means a person who produces or offers one or more entertainment programs for network exhibition, other than NBC, a person controlling NBC, or a person in which NBC or a person controlling NBC has an ownership interest.

(G) "Network Exhibition" means the initial and repeat exhibitions of a television program on the NBC television network during the term of any agreement between NBC and an independent program supplier for such exhibition of such program.

(H) "Prime Time Hours" means the hours from 6:00 p.m. to 11:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 5:00 p.m. to 10:00 p.m. in the Central and Mountain Time Zones of the United States.

(I) "Daytime Hours" means the hours from 9:00 a.m. to 6:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 9:00 a.m. to 5:00 p.m. in the Central and Mountain Time Zones of the United States.

(J) "Fringe Hours" means the hours from 11:00 p.m. to 2:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 10:00 p.m. to 1:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Central and Mountain Time Zones of the United States.

(K) "Television Broadcast Station" means a station licensed as a television broadcast station by the Federal Communications Commission.

(L) "NBC Production Facilities" means studio facilities, including but not limited to, scenery, props and other production equipment, which are used for the production of entertainment programs exhibited or intended to be exhibited on television, and which are owned or leased by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

(M) "Stripping" means the broadcasting of more than one (1) episode per week of a television program series.

(N) "Broadcast Year" means the television broadcast year customarily commencing in September of one year and continuing until September of the following year.

III.

[*Applicability*]

The provisions of this Final Judgment are applicable to NBC, to any person controlling NBC and to each of NBC's directors, officers, agents, employees, subsidiaries, successors, and assigns, and to all persons in active concert or participation with any of them, who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

[*Independent Productions*]

NBC is enjoined and restrained from:

(A) Acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by an independent program supplier, other than the right to the Network Exhibition of the program, except as provided in Sections VIII(A)-(D) of this Final Judgment, *provided that* an agreement granting NBC the right to Network Exhibition may include provisions concerning subject matters incident to the licensing and use of network programs, of which the following are examples: geographic scope and manner of transmission and delivery of network broadcasts; approval of creative elements and program content; technical quality and delivery requirements; union and Equal Employment Opportunity Act compliance; act of God; force majeure; preemptions; obligation to pay for, rather than play, programs; number of episodes or programs ordered; assignability; warranties; indemnification; completion bonds; security agreements and financing statements; insurance; public morals; advertising conflicts; advertising, promotion and publicity of programs; audience testing and screening; cancellation; exclusivity for talent and creative personnel; exclusive exhibition rights (except as limited by Sections VI(E)(ii)-(iii) herein); pilots (except as limited by Section VI(F) herein); options (except as limited by Sections VI(E)(i); VI(F) and VI(G) herein); first negotiation and first refusal rights (except as limited by Sections VI(E)(i) and VI(G) herein); spin-offs (except as limited by Section VI(G) herein); repeats (except as limited by Section VI(H) herein); same day protection against once weekly syndication programs and theatrical feature films; title protection for the length of the applicable contract or contracts; format and continuing character protection; breach; and remedies, so long as any such provision does not violate the antitrust laws.

(B) Selling, licensing, or distributing entertainment programs to television broadcast stations for non-network television exhibition (or otherwise engaging in the business

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commonly known as "syndication"), or to foreign television stations or networks, except as provided in Section VIII(D) of this Final Judgment.

V.

[*Network Productions*]

(A) NBC is enjoined and restrained for a period of ten (10) years from the effective date of this Section from offering for NBC network broadcast during Prime Time Hours, Daytime Hours or Fringe Hours, more than two and one-half (2½) hours per week in Prime Time Hours, more than eight (8) hours per week in Daytime Hours, and more than eleven (11) hours per week in Fringe Hours, determined on the average per compliance period, of entertainment programs obtained from sources other than independent program suppliers, *provided that* during each compliance period NBC may add to the total number of allowable hours of entertainment programming from sources other than independent program suppliers, two (2) non-regularly scheduled special programs, and *provided further that* in any compliance period, NBC may, during Fringe Hours, increase the number of allowable hours of entertainment programming from sources other than independent program suppliers by reducing to the same extent the number of allowable hours of such programming in Prime Time Hours and/or Daytime Hours.

(B) For purposes of this Section V, compliance periods shall be consecutive semi-annual periods commencing at the start of each broadcast year. Compliance reports in the form set forth in Appendix B to this Final Judgment shall be submitted by NBC to plaintiff within thirty (30) days following the conclusion of each compliance period.

VI

[*Conditions; Acquisitions*]

NBC is enjoined and restrained:

(A) From purchasing or offering to purchase from an independent program supplier the right to Network Exhibition of one or more entertainment programs upon the condition, express or implied, that NBC, or any person controlling NBC, will obtain any other right or interest from said supplier, except as to contractual provisions concerning subject matters incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(B) For a period of fifteen (15) years from the effective date of this Section, from purchasing or offering to purchase from an independent program supplier any right to the exhibition of a program, other than a live program, as an NBC television network entertainment program upon the condition, express or implied, that said supplier produce the program, in whole or in part, utilizing NBC production facilities.

(C) For a period of fifteen (15) years from the effective date of this Section, from agreeing with an independent program supplier that said supplier use NBC production facilities to produce a program, other than a live program, as an NBC television network entertainment program for a period in excess of the time required to produce episodes for one (1) broadcast year, *provided that* NBC and said supplier are not precluded each year from negotiating and contracting for additional periods not to exceed one (1) year each.

(D) For a period of ten (10) years from the effective date of this Section, from purchasing or offering to purchase from CBS Inc., ("CBS") or American Broadcasting Companies, Inc. ("ABC") any right to Network Exhibition of any entertainment program upon the condition, express or implied, that CBS or ABC agrees to purchase or offers to purchase a right to network exhibition of any entertainment program produced or controlled by NBC.

(E) For a period of fifteen (15) years from the effective date of this Section, from:

(i) Acquiring from an independent program supplier options for Network Exhibition of a prime time network entertainment program series exercisable for a period in excess of four (4) years from the date of first broadcast of an episode of such program as part of an NBC prime time television network entertainment program series, and the balance of any broadcast year in which such four (4) year period ends, *provided that* nothing herein shall prevent NBC, after the date of first broadcast, from negotiating new provisions which may include the purchase of an extension of the option period to five (5) years from the date of first broadcast, and the balance of any broadcast year in which such five (5) year period ends, and, at the end or during the final year of any contract term, from negotiating for and entering into new agreements with said supplier so long as the options acquired under any such new agreements do not exceed a period of four (4) years from the date of first broadcast of

an episode under such new agreements, and the balance of any broadcast year in which such four (4) year period ends, plus the right to negotiate for and acquire a fifth option year, and *provided further that* nothing herein shall prevent NBC from acquiring first negotiation and first refusal rights for new agreements with said supplier so long as any such first refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms, and *provided further that* nothing herein shall prevent NBC from entering into contractual provisions incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(ii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for prime time network entertainment program series episodes for which NBC has exercised a contractual right to Network Exhibition, in excess of the following:

(a) for prime time use, the duration of any contract term or terms by which NBC acquires the right to Network Exhibition;

(b) for non-prime time stripping on television broadcast stations, four (4) years from the first prime time episode broadcast; and

(c) for all other broadcast uses, three (3) years from the first prime time episode broadcast,

provided that nothing herein shall prevent NBC from negotiating for and acquiring rights, including exclusive rights, for stripping and once weekly exhibition to be utilized after the periods of exclusivity set forth above, so long as negotiation for and acquisition of such rights takes place after NBC has agreed to order episodes of such program for the first year of broadcast as an NBC prime time television network entertainment program series, and *provided further that* nothing herein shall prevent NBC from acquiring exclusive exhibition rights to series episodes for the broadcast year for which such episodes are ordered.

(iii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for theatrical feature films for which NBC has a contractual right to Network Exhibition, against:

(a) theatrical and non-theatrical direct [illegible];

(b) closed circuit TV in non-residential hotels, motels, bars, restaurants, hospitals and similar non-residential institutions;

(c) passenger-carrying vehicles;

(d) video discs, cartridges or cassettes or other such equipment;

(e) pay or subscription television, via cable or any other means, where a per-program or per-channel charge is made to the viewer, except that NBC may acquire exclusive rights to any such feature film commencing thirty (30) days prior to the first date and extending until the last date on which NBC may broadcast such feature film under the contract between NBC and such supplier, so long as this period of exclusivity between the first and last dates on which NBC may broadcast such feature film under such contract does not exceed twenty-four (24) months, and does not exceed twelve (12) additional months for each exhibition greater than two (2) to which NBC acquires the exhibition rights.

(F) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier a first year pick-up option for exhibition of a prime time network entertainment program series based on a program designated by NBC and said supplier as a "pilot program" ("pilot") which is exercisable after the following times:

(i) where NBC has not advanced said supplier any part of the costs of pilot development, subsequent to the earliest date that the agreement contemplates that broadcast of the series may commence; and

(ii) where NBC has advanced said supplier any part of the costs of pilot development, more than one (1) year after delivery to NBC of the completed pilot, *provided that* as to those series which NBC does not include in the network schedule at the earliest date that the agreement contemplates that broadcast of the series may commence:

(a) for those pilots which have been delivered to NBC between October 2 of one year and April 1 of the following year, NBC must designate by July 1 of the latter year sixty-five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots; and

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(b) for those pilots which have been delivered to NBC between April 2 and October 1 of the same year, NBC must designate by January 1 of the following year sixty-five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots;

and *provided further that* NBC may purchase additional first year pick-up options for series which NBC has not designated for release and for series which NBC has designated for option release but which NBC wishes to retain, so long as such additional options are acquired, for pilots described in Section VI(F)(ii)(a), after June 1, or after the announcement of the NBC television network schedule for the next broadcast year, whichever is later, and, for pilots described in Section VI(F)(ii)(b), after December 1, and so long as such additional options do not exceed increments of six (6) months.

For purposes of this Section (VI)F:

A pilot shall be deemed to have been delivered to NBC when NBC has received, in the case of a film pilot, an answer print, and, in the case of a tape pilot, a program complying with customary tape requirements.

In computing the number of pilots to be released under Sections VI(F)(ii)(a) and (b), any fraction of a pilot shall be rounded off to the next lower whole number.

Unrecouped costs shall be deemed to be the amount of money advanced by NBC to an independent program supplier for the development of a pilot, except that if the NBC television network broadcasts a pilot once, two-thirds (⅔) of NBC's costs shall be deemed to have been recouped, and if NBC broadcasts a pilot more than once, all of NBC's costs shall be deemed to have been recouped.

(G) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier rights in excess of first negotiation and first refusal rights for a spinoff involving a non-continuing character.

For purposes of this Section VI(G):

First refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms.

A non-continuing character shall be deemed to mean one who appeared in no more than twenty-five percent (25%) of the original episodes of the program upon which such spinoff is based during the twelve (12) months prior to the time exhibition rights to such spinoff are offered for licensing by said supplier.

(H) For a period of ten (10) years from the effective date of this Section, from purchasing from an independent program supplier a right to first run Network Exhibition of any television entertainment program series which includes the right to exhibit repeats of episodes in years subsequent to the broadcast year of initial exhibition of such episodes, *provided that* repeat rights to three (3) initial episodes per broadcast year of each such program series may be purchased for exhibition in subsequent broadcast years as part of the right to Network Exhibition, and *provided further that* additional rights to repeats may be purchased for exhibition in subsequent broadcast years, so long as negotiation for and acquisition of such additional repeat rights takes place after NBC has agreed to order episodes of such program series for the first year of broadcast as an NBC television network entertainment program series, and *provided further that* the limitation as to the use of repeats contained in this Section VI(H) shall not apply to (i) made-for-television and theatrical feature films, (ii) specials, and (iii) cartoons or other children's programs.

VII.

[*Other Networks*]

The following Sections of this Final Judgment shall not take effect until similar injunctive relief is obtained in Final Orders, Judgments or Decrees entered against CBS in *United States v. CBS Inc.*, Civil Action No. 74-3599-RJK (C. D. Cal.), and against ABC in *United States v. American Broadcasting Companies, Inc.*, Civil Action No. 74-3600-RJK (C. D. Cal.) which are not appealable or from which no timely appeal is taken: V, VI(C), VI(E)(i), and VI(F) through (H).

VIII.

[*Permitted Transactions*]

Nothing contained in this Final Judgment shall be construed:

(A) To prohibit NBC from acquiring rights for non-network broadcast of programs by NBC owned and operated television broadcast stations where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights including renewal rights, for the exhibition, distribution or use of any

program as an NBC televsion network program.

(B) To prohibit NBC from [illegible] repayment, in whole or in part, of money or other consideration loaned, advanced or furnished by NBC in connection with the development or production of a television network program or of a project or activity that may result in a television network program, to the extent of the amount loaned, advanced or furnished, including interest.

(C) To prohibit NBC from acquiring rights with respect to non-broadcast uses, including but not limited to publication of books or music, where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program.

(D) To prohibit NBC from selling, licensing, or distributing outside the United States programs (i) produced in foreign countries and not included in NBC's television network schedule, where the acquisition of such distribution rights is not conditioned, directly or indirectly, upon the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program, or (ii) produced by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

IX.

[*Modification*]

If a Final Order, Judgment or Decree is entered with respect to CBS in *United States v. CBS Inc.*, Civil Action No. 74-3599-RJK (C. D. Cal.), or with respect to ABC in *United States v. American Broadcasting Companies, Inc.*, Civil Action No. 74-3600-RJK (C. D. Cal.), which is not appealable or from which no timely appeal is taken, which shall order or decree for either CBS or ABC injunctions different in terms or provisions than those required by this Final Judgment, or which shall result in the dismissal of either or both of such actions, NBC may apply to the Court and shall be granted a modification of or relief from any terms set forth herein as may be necessary to prevent NBC from being placed at a competitive disadvantage with respect to CBS or ABC.

X.

[*Notice*]

(A) Within thirty (30) days after the entry of this Final Judgment, NBC shall furnish to its officers, directors, and appropriate employees and agents a copy of this Final Judgment, and each year for a period of ten (10) years thereafter NBC shall furnish a copy to all new officers, directors and appropriate employees and agents. NBC shall maintain a file listing all persons to whom it has furnished such copies.

(B) Within thirty (30) days after entry of this Final Judgment and once each year during the succeeding ten (10) calendar years following entry of this Final Judgment, NBC shall send a copy of this Final Judgment to the last known address of each independent program supplier known to have offered any entertainment program to NBC for inclusion in its schedule of NBC television network programs within the preceding five (5) years and to each person listed in the then current issue of Television Factbook as a provider of television production facilities.

XI.

[*Inspection*]

(A) For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and on reasonable notice to NBC made to its principal office, shall be permitted, subject to any legally recognized privilege:

(1) access during the office hours of NBC to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of NBC relating to any matter contained in this Final Judgment; and

(2) subject to the reasonable convenience of NBC and without restraint or interference by it, the right to interview officers or employees of NBC, who may have counsel present, regarding any such matter.

(B) NBC, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested.

No information obtained by the means provided in this Section XI shall be divulged by any representative of plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal

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proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XII.

[*Retention of Jurisdiction*]

Jurisdiction is retained by this Court for the purpose of enabling either party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XIII.

[*Public Interest*]

Entry of this Final Judgment is in the public interest.

Antitrust Immunity—State Action

[¶ 50,293]

The "practical message" of four recent U. S. Supreme Court decisions in the area of "state action" antitrust immunity was outlined recently by Donald I. Baker, chief of the Antitrust Division. He discussed *Cantor, Goldfarb, Virginia Pharmacy* (not reported in TRADE REGULATION REPORTS) *Gibson v Berryhill*, 411 U. S. 564 (1973). According to Mr. Baker:

[*Partial Text (Footnotes omitted)*]

"First, the *command* of the *state as sovereign* provides an antitrust exemption for those private activities which have been commanded.

"Secondly, *formal approval* of private conduct by the state as sovereign may or may not be tantamount to a state command. However, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' This is essentially a fact question depending on the state's role in bringing about the restraint, its interest in it and the nature of its action, or, as the Court said in *Cantor*, whether 'the State's participation in a decision is so *dominant* that it would be unfair to hold a private party responsible for his conduct in implementing it.'

"Third, what qualifies as the 'state as sovereign' is also a fact question. Clearly the Legislature, the Judiciary or the Executive exercising those functions entrusted to them by the state constitution are the 'state as sovereign.' On the other hand 'a state agency for some limited purposes,' to borrow a phrase from *Goldfarb*, may not be the sovereign state for other purposes, either because it is acting beyond its necessary duty or because its decisionmakers have a private pecuniary interest in the outcome. Where a private group is 'masquerading under the banner of state action' no antitrust exemption will be available for anyone.

"Fourth, state *delegation* of power to a private person or group, i. e. a nonsovereign, does not itself provide such a defendant with an antitrust exemption when that power is used to restrain competition. Such delegation not only raises antitrust problems, it may also be subject to the due process infirmities of the delegation struck down in *Gibson v Berryhill*.

"Finally, informal state encouragement of a private restraint does not provide an antitrust exemption. That goes all the way back to *United States v Socony-Vacuum Oil Co.* 'Virtual volunteers' may not be given the power to take 'state action.' However, while all this seems to me to be reasonably clear, it does not answer some really hard fact questions in individual cases.

"Two types of situations that are likely to occur in some normal business arrangements particularly need discussion. One involves classic public utility regulation in which action typically is proposed by a private party and is approved, perhaps with modification, by the state utility commission. As the Supreme Court indicated in *Cantor*, this is truly 'a blend of private and public decisionmaking.' The second situation involves self-regulation by a professional or trade body delegated some authority by the state. Pharmacy boards and real estate licensing boards are well known examples of this category. Lesser known examples include self-regulatory boards for barbers, cleaners, contractors, cosmetologists, employment agencies, furniture and bedding manufacturers, structural pest control operators and funeral directors.

"The two situations have similarities and differences. A state utility commission is normally what I would call an *independent state regulator*. It is made up of salaried, full-time officials, normally appointed by the Governor. Such officials are barred from having any outside interests. To the extent that such an independent regulatory board is acting within its mandate in promulgating regulations necessary to make a regulatory statute work, it normally qualifies as 'the state as sovereign' and its officers are thus immune from antitrust suit. The basic questions in these cases include whether the state has been so much the moving or dominant force in bringing about the challenged restraint, and whether the restraint is central to the state's mission in the area.

"The second situation involves what is essentially a *self-regulator*. Here the organizational board is normally appointed from members of the industry or profession being regulated or is even elected by them. Their compensation is often nominal at best, and they generally continue to practice in the regulated field while serving on the board. Sometimes their decisions require ratification by a vote of the very group being regulated. Typical examples of such self-regulatory groups would be the Alabama Optometry Board in *Gibson v. Berryhill* and the Agricultural Prorate Commission in *Parker v. Brown*.

"The most difficult cases will frequently involve *approvals* by independent regulatory commissions and *commands* by self-regulatory bodies. These situations present the most opportunity for private initiative and action which is not in fact within the scope of what is necessary to the regulatory scheme as legislated by the state as sovereign. An agency's rubber-stamp approval of restrictive activities proposed and executed by private persons or companies does not relieve the private entities of responsibility for the consequences of their activities. Nor may an 'interested' self-regulatory group assume that it has a roving mandate to command its members to engage in activities which profit the profession to the detriment of consumers, competitors, and the economy. The tremendous inherent—and often invisible—opportunity to use a self-regulatory mechanism to serve the members' interests at the expense of the public may well mean that no self-regulatory group can be sufficiently unbiased to satisfy the requirements of both *Cantor* and *Gibson v. Berryhill* where it chooses to restrain competition.

"We must look at these issues in a broader perspective. Our economy is one which is based primarily on individual effort and entrepreneurial risk taking. It is characterized by a mixture of private and public decisionmaking in which antitrust and direct regulation serve related *public interest* goals. The Supreme Court made this quite clear in *Philadelphia National Bank* where it emphasized that the fact that an industry, such as banking, was highly regulated 'makes the play of competition not less important but more so.' It has long been recognized that the basic goal of regulation and the basic goal of the antitrust laws is the same—'to achieve the most efficient allocation of resources possible,' and that '[i]ndustries have been more progressive when the agencies have endeavored to confine regulation to a necessary minimum and have otherwise fostered competition.' *Cantor* and earlier cases indicate that the courts are going to be concerned about the application of antitrust principles to regulated sectors of the economy—which can be unpalatable to those regulated because antitrust-mandated markets do interfere with the highly paternalistic *private interest* arrangements often fostered under the cover of regulation. *Cantor* makes clear that courts are going to look behind the catchwords 'state action' to see whether the sovereign state is truly there or whether private interests are there attempting to cloak themselves in the state's sovereignty. This is good. It gives me hope that the third century of the Republic will see more economic liberty—more 'public interest competition'—and less protective 'special interest regulation.'"

Mr Baker's remarks were prepared for delivery before the Council of American Bar Association Public Utility Law Section in White Sulphur Springs, West Virginia, on October 28, 1976. See ¶ 620.42.

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NATIONAL CABLE TELEVISION ASSOCIATION

Office of The General Counsel

March 1, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D. C. 20530

Re: Comments of the National Cable Television Association, Inc., on the Proposed Consent Decree in United States v. National Broadcasting Co., Inc., Civil Action No. 74-3601-RJK, U.S.D.C., C.D. Cal.

Dear Mr. Hollander:

The attached comments are filed on behalf of the National Cable Television Association, Inc., the principal national trade association for the cable television industry. They are filed in connection with the proposed Consent Decree in the above-referenced litigation and pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act. NCTA urges the Department of Justice to withdraw its consent to the proposed decree.

NCTA's objection to the decree is directed to that portion which relates to the amount of contractual exclusivity which NBC is permitted to obtain against pay cable. As spelled out in our comments, this provision does no more than approve existing practices which are demonstrably anti-competitive in intent, and when taken together with the FCC's anti-siphoning rules, are certainly anti-competitive in effect. In addition, the distinction made between pay cable and other methods of exhibiting pay programming is not logical and is potentially harmful.

continued. . . . . .

918 SIXTEENTH STREET NORTHWEST WASHINGTON DC 20006 202-457-6700

NCTA continues to feel that no exclusivity is warranted and that the Department of Justice should continue to pursue this litigation unless a sharply circumscribed agreement can be reached with NBC. The network simply cannot justify more than a short pre-telecast date period of protection.

We would be glad to provide further information and/or meet with you at any time prior to the final decision in this matter.

Sincerely,

Stuart F. Feldstein
Vice President/General Counsel

SFF/ag
Enclosure

Before the

DEPARTMENT OF JUSTICE

Washington, D.C.

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION TO THE PROPOSED CONSENT DECREE IN UNITED STATES v. NATIONAL BROADCASTING CO.

These comments are submitted by the National Cable Television Association, Inc., (NCTA), in connection with the proposed Consent Decree filed in United States v. National Broadcasting Company, Inc., Civil Action No. 74-3601-RJK, on November 17, 1976 in the U. S. District Court for the Central District of California. These comments are filed pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 16(d).

NCTA is the principal national trade association for the cable television industry. It represents cable television operators, purveyors of programming, manufacturers and suppliers of equipment and others providing services to the industry. As such, our interest in the proposed Consent Decree is immediate and direct. NCTA strongly urges the

Department of Justice to withdraw its consent to the proposed Decree.

Our specific objection to the Decree arises from the provision dealing with pay cable television which is incorporated in Section VI (E) (iii) (e). In short, this provision does not alter present anti-competitive practices by NBC; it places an imprimatur on existing practices; and, taken together with the surrounding provisions, it discriminates against pay programming via cable vis-a-vis other delivery methods.

I. BACKGROUND

At the present time there are approximately 3,500 CATV systems serving in excess of 12,000,000 television homes. These systems are located in every state of the union. The 12,000,000 subscribing homes represent about 15% of the nation's 72,000,000 television homes. Of this number there are presently about 1,000,000 cable subscribers who also have opted to receive a supplementary pay service. Pay cable is a supplementary service available to subscribers to the basic CATV service for an additional monthly or per program fee. It consists of feature films, sports events and other special programming presented in a format

uninterrupted by commercials. The non-live programming is usually repeated a number of times so as to afford subscribers more than one opportunity to view the program. Feature films are the bread and butter of this service. The quality and quantity of this product made available on a timely basis is absolutely crucial to the viability of pay cable. 1/

Feature films are shown first in movie theaters. It is there that their critical reputation is established and thus their commercial value is set. It is immediately after the theatrical run that this product has the most value to pay cable. Virtually all English-language product except for X-rated films are then purchased for later network display. Thus, the logical time sequence is theater-pay cable-network for new films. Older films may be recycled through some or all of these phases in no particular order. The networks have tried to intrude on this process, however. Although feature films play a declining role in the networks' programming, 2/ they have perceived it to be in their interest to attempt to deny films to pay cable.

1/ Only about 100 films are released annually by the American movie industry. Many other films are made by and for the networks themselves (perhaps 50% of the films shown). These films, of course, rarely run in the theaters and are never sold to pay cable.

2/ Illustrative of the networks' lessening reliance on feature films is a Variety story of May 7, 1975, reporting that " all three [networks] slice movie nights."

This has been done in two principal ways, contractual exclusivity provisions and successful lobbying for restrictive FCC regulations. Taken together, the effect of these actions has made it extremely difficult for the pay cable industry to obtain what limited product is available on a timely basis.

II. THE NETWORKS HAVE AN EFFECTIVE STRANGLEHOLD ON PAY CABLE

The networks have effectively created and maintained controls over the growth of pay cable in two distinct but interrelated developments. The first method was to lobby for the establishment and maintainance of the FCC's "anti-siphoning" rules. These rules were first instituted in 1971 and were revisited by the Commission in 1975. 3/ All three major networks engaged in significant attempts to have the most restrictive rules possible imposed on pay cable. This was made obvious in a number of ways in addition to the filing of strong comments. 4/ Without any question the networks have looked upon the FCC's rulemaking processes as a forum for the accomplishment of their anti-competitive goals.

3/ See First Report and Order in Docket 19554, 52 F.C.C. 2d 1 (1975).

4/ See, e.g., Television Digest, March 4, 1974, pp. 1-2, where it was reported that then-Chairman Dean Burch was subjected to Senatorial pressure "prompted by Hill visit by [ABC executives] whose only goal was to put halter on relaxation of pay cable rules."

The present FCC rules as they apply to feature films on pay cable testify to the success which the networks have enjoyed at the FCC. 5/ Films which are less than three years old can be purchased for exhibition on pay cable (but, of course, only if a network has not succeeded in obtaining exclusivity). Films between the age of three to ten years old are also available to pay cable but only if the film is under contract and available for exhibition to a network or a television station in the particular market. (Again, exclusivity makes this provision meaningless.) Films which are older than ten years can also be shown on pay cable under the same circumstances as the three to ten year old films or if the film has not been shown on commercial television in the market for three years. Foreign language films are excluded from these restrictions.

The networks have compounded the restrictive effect of these rules by purchasing substantial contractual exclusivity against pay cable. Film suppliers do not make films available to anyone until the theatrical run is complete. The better product runs in the theaters for between 12 and 24 months and "blockbuster" films run in the theaters for periods

5/ 47 CFR 76.225. These rules are presently under challenge in the United States Court of Appeals for the District of Columbia, Home Box Office, Inc. v. F.C.C., No. 75-1280 et al.

sometimes exceeding three years. This makes the time for pay cable exhibition of a film in the zero to three year period a very narrow time frame. Networks often come in immediately after the theatrical run and purchase the rights to exhibit films at a later date. The exclusivity which is obtained may begin on the date of the contract signing, thus barring any pay cable exhibition. The effect of this practice is to preclude any pay cable access to these feature films far in advance of the first telecast of the film. The duration of such exclusivity is generally extended through the expiration of a lengthy broadcast period which may be two to four years or more. Depending upon the length of the theatrical run, a pay cable entrepreneur may find himself faced with no access period during the first three years because a network has contracted for exclusive rights to a film, or if pay cable exhibition rights had already been obtained, films can be pulled back by suppliers because of the signing of a subsequent network contract. To recapitulate, network exclusivity sometimes has the effect of cutting pay cable access to a film during the first three years of its life to either a very limited time period or no time at all.

And, of course, once a film is three years old, the

Commission's rules, together with exclusivity practices, create a "Catch-22" situation. In order for a film to be permitted to be shown on pay cable it must be under contract to a television station in the market, and the existence of contractual exclusivity completely closes off this possibility. Indeed, to our knowledge, there has not been one film made available to pay cable under this provision of the FCC's rules, so thoroughly does the practice of exclusivity permeate the market place. Likewise, in the post-ten year period, all of the most attractive films are tied up by exclusive contracts.

Thus network exclusivity obtained against pay cable is itself an anti-competitive practice which unreasonably restricts trade. Taken together with the FCC's rules, exclusivity completes an all but impenetrable web around the pay cable industry.

III. PRESENT LEVELS OF CONTRACTUAL EXCLUSIVITY ARE CLEARLY UNREASONABLE

The contractual exclusivity which networks obtain against pay cable is patently unreasonable. It is not needed by either the networks or the film suppliers, thus the intent is anti-competitive.

The initial question to be asked is whether the network practices restrict the presentation of alternative programming.

Pay cable is obviously such an alternative mode of delivery. It presents the opportunity to view feature films in the home for a fee in their unedited version, uninterrupted by commercials and at a time convenient to the subscriber. The only thing pay cable has in common with network exhibition is the use of the home television set. Exclusivity imposed against such exhibition by an industry which presents its programming in a commercial format free of direct charge is unreasonable. Exclusivity is obtained against pay cable despite the fact that no real competition is presently possible. Thus exclusivity is obtained by the networks solely for predatory reasons and, as demonstrated above, exclusivity against pay cable works with the FCC's rules to practically preclude even the minimal access to feature films permitted by those rules.

Furthermore, in our opinion, the networks' exclusivity practices are in violation of the antitrust laws. Restraints ancillary to the transfer of property rights are legal only if they are reasonably necessary to protect the purchaser of the property in the enjoyment of the purchase. 6/ This antitrust doctrine was extended to the licensing of feature

6/ United States v. Addyston Pipe and Steel, 85 Fed. 271, 282 (6th Cir. 1898), affd. 175 U.S. 211 (1899).

films in United States v. Paramount Pictures.7/ It has also been applied to television program contracts.8/

The applicable test for determining the reasonableness of the anti-pay cable exclusivity provisions is set forth in the Paramount opinion. This case was the culmination of several antitrust cases which examined the several methods used to suppress theater competition.9/ The sum and substance of these decisions was a finding that film licensing provisions were illegal when geared to the anti-competitive requirements of exhibitors instead of the revenue requirements of distributors. The Court in Paramount, for example, held that clearances are reasonable only "when not unduly extended in area or duration" and conversely are unreasonable if "in excess of what is reasonably necessary to protect the license in the run granted".10/

These cases establish two propositions that have

7/ 66 F. Supp. 323, 70 F. Supp. 53 (S.D.N.Y. 1946), reversed and remanded in part, 334 U.S. 131 (1948); 85 F. Supp. 881 (S.D.N.Y. 1949), affirmed, 339 U.S. 974 (1950).
8/ United States v. Loew's, Inc., 371 U.S. 11 (1962).
9/ Interstate Circuit v. United States, 306 U.S. 208 (1939); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Schine Theaters v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948).
10/ 334 U.S. 131, 145, 147.

specific applicability to the contractual exclusivity at issue in this litigation. First, protection cannot be obtained by a network licensee against another entity not in substantial competition with the network. Second, any exclusivity provisions must reflect the revenue needs of the copyright owners, not the anti-competitive designs of the networks. Application of these "rule of reason" tests against the various exclusivity provisions used by NBC and the other networks to restrict pay cable exhibition must result in a conclusion that they are unreasonable.

A. Pay Cable is Not in Substantial Competition with Network Television

Applying the first Paramount test, pay cable and the networks are not in substantial competition so as to justify the contractual exclusivity obtained by the networks. In the commercial television marketplace program costs (and profits) are paid by advertisers. Networks compete among themselves for this revenue. Pay cable does not compete with the networks for these dollars, rather it seeks its revenue directly from the subscribing consumer. Networks sell programs to advertisers based on the potential of reaching over 70 million television homes. Attractive feature films help make this mass circulation of the advertiser's message possible. Pay cable presently reaches

about 1,000,000 homes. No advertising is permitted and the commercial value of the service is obviously not based on a mass appeal to a large audience. Pay cable thus represents about 1% of a network's potential audience. Even the rapid growth of pay cable will not detract from the value of a feature film to a network. Indeed, the absolute growth in television households has been greater than the growth of pay cable subscribers.11/

It is inconceivable that pay cable exhibition will result in any loss of revenue to the networks in the foreseeable future. Any adverse affect must be presumed to flow from a decline in viewing levels caused by pay cable exhibition. But there is no evidence of this happening. Even assuming some small relative decline in viewing audience, this has been more than offset by higher prices being paid by advertisers and the growth of television homes.

Furthermore, the networks' theory, that if pay cable subscribers view a film on pay cable that film will be less

11/ According to American Research Bureau statistics, television households have been increasing by more than 1,000,000 per year for the past several years. Thus, there were 68,770,000 as of January 1, 1975, 70,550,000 as of January 1, 1976, and an estimated 72,000,000 as of January 1, 1977.

attractive to the networks, is simply untenable. It is at least equally likely that pay cable exhibition will have a positive impact on network viewing of feature films. Just as a long and successful theatrical run enhances the popularity of a film when it is shown on a network, pay cable exhibition may well add to viewer interest in a film.12/ This will likely be true at least until pay cable can command audiences comparable in numbers to the networks. The networks pay millions of dollars to obtain the rights to show films which have been seen by over 25,000,000 people in the theaters, but they seek no exclusivity against the theaters in advance of network exhibition. There is no difference between this situation and pay cable.

A person who has seen a movie in a theater often watches it again on the network just as viewers watch reruns in the second half of the network season and, indeed, in subsequent seasons. Why would a pay cable subscriber not view a film on the network some time after he had seen it on pay cable? NCTA submits that pay cable is simply an extension of the theater, except that the pay cable audience is much

12/ "Gone with the Wind" played to an estimated 25,000,000 paying customers in a multi-year theatrical run. In November, 1976, its premiere network exhibition achieved record ratings. Indeed, it had even been shown on pay cable only five months earlier. This is not an atypical result.

smaller.

The networks say they must have exclusivity far in advance of network showing in order to prevent pay cable exhibition too close to the time when the network will exhibit the film. In light of the networks' oft-repeated message as to the merits of "free" television versus pay television, it is inconceivable that a pay cable showing shortly in advance of a heavily advertised network exhibition is going to have any meaningful effect on a network's audience. As a matter of fact, the courts have assumed that a prior exhibition to a paying audience does not materially reduce the audience for a less expensive or free exhibition of a film. 13/

As to the availability of a film to a network, there is simply no question but that the networks can obtain any film they want to purchase. Pay cable exhibition does not alter the economic facts of life. Movie distributors will sell any and all of their product to the networks.

Thus, there is no basis for the networks to demand contractual exclusivity since pay cable presents no

13/ Interstate Circuit v. United States, 306 U.S. 208, 228-230 (1939).

substantial competition to the networks. Exclusivity is not "reasonably necessary to protect the [network licensee] in the run granted," thus it is unreasonable.

B. Network Exclusivity is Not Designed to Maximize Copyright Rewards

Under the second Paramount test, exclusivity must reflect the revenue requirements of the copyright owner and not the needs of the network licensee. It is clear that the copyright owner obtains the largest possible commercial reward from maximum circulation of his product. On the other hand, the networks have an obvious interest in repressing another mode of exhibiting the product to the home viewer. Networks thus use their substantial economic leverage to obtain unreasonable exclusivity from the copyright owner.

Testimony at hearings held during the 94th Congress amply demonstrates that the movie distributors look upon the development of pay cable as a promising way to enlarge their revenue potential. 14/ It is not difficult to conclude that it is the monopoly position of the networks which results in exclusivity against pay cable, not the need for this exclusivity by the film suppliers. Networks have many

14/ Hearings on the Pay Cable Television Industry Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (1975).

films produced exclusively for television and have further economic leverage resulting from their placement of television series production. This network dominance of relatively large numbers of film suppliers is further supported by the huge profits which the networks enjoy from their preeminent access to the public spectrum.15/

The film suppliers do not wish to see their product tied up by one buyer for an extended period of time.16/ Films could be sold to several buyers thus receiving larger circulation and revenue. Repetition over a period of time will result in greater audience viewing and thus greater revenue.

It is obviously very difficult for an individual film supplier to resist the demands of a huge oligopoly customer for extensive exclusivity against pay cable. The exclusivity

15/ According to the most recent figures available from the FCC, the three commercial networks enjoyed pre-tax profits of over $200,000,000 in 1975. Newspaper accounts point to even higher levels in 1976. By comparison, the pay cable industry presently grosses about half this amount, and this is split among some ten different pay cable companies.

16/ In Hearings on Cable Television Regulation before the House Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, 94th Cong., 2nd Sess. (1976), Jack Valenti, President, Motion Picture Association of America, confirmed this by stating,

> "[K]eep the exhibition sequence in mind for it is the linchpin of movie distribution strategy. First, to theatres, the primary market for movies; then to pay cable, then to networks; and on to individual station syndication. Even if there is the power to outbid, the sequential marketing logic will not be disturbed. The movie industry sees pay cable as an additional market, between theatrical and network exhibition." (p. 649)

demanded by the networks against pay cable is obtained because it is the only way the networks will deal. These contractual restrictions do not reflect the needs or desires of the copyright owners.

IV. THE TERMS OF THE PROPOSED CONSENT DECREE ARE HARMFUL TO PAY CABLE

Even if it is felt that some form of contractual exclusivity should be permitted, the limitations proposed in the Consent Decree are illusory and do not in any real way limit NBC's ability to utilize exclusivity in an anti-competitive fashion.17/ Not only are the terms so liberal as to be almost meaningless, but the failure to include the network owned and operated television stations is an inconsistent omission. Furthermore, the Consent Decree forbids NBC to obtain exclusivity against all modes of pay programming delivery except for pay television (cable and over the air). This discrimination has no rational basis.

A. The Proposed Front-end Limitation is Meaningless

NBC is to be permitted to obtain exclusivity against pay cable commencing 30 days prior to the date on which the film will be available for broadcast. This "availability date" concept is simply irrelevant. It is set for the

17/ The "limitation" in the proposed decree is really very little less exclusivity than NBC has been obtaining. Their practice has been to obtain exclusivity against pay cable starting 60 days prior to the availability date and running through the availability period. See Senate hearings, p. 222; FCC Docket 20402, Comments of National Broadcasting Co., p. 2.

tax purposes of the film suppliers and/or for the anti-competitive purposes of the networks. It bears no relationship to when the networks plan to actually telecast the film.

Availability date is a date which is often months or even years in advance of the first "telecast" date of a particular film. Available information submitted during the Senate hearings demonstrates this fact. For example, of the 113 different films listed by NBC as having been shown in an 18 month period, 53 were not shown until at least 6 months had elapsed after the availability date.18/ Many did not appear until a year or more had gone by. The same is true of the other two networks. Thus, the use of availability date as an exclusivity benchmark permits the networks, with certain exceptions, to obtain a minimum of six to nine months pre-clearance on a feature film before its actual date of first telecast.

Obviously the availability date is not established with film telecast dates in mind. Instead the date is often most meaningful to the motion picture companies as the date when income from a particular film sale is appropriately entered on the company's books.19/ The time

18/ Senate hearings, pp. 227-229.
19/ See Accounting for Motion Picture Films, prepared by the Committee on Entertainment Industries of the American Institute of Certified Public Accountants, pp. 6-8.

of income is critical to motion picture companies whose economic fortunes fluctuate greatly from year to year. Thus, the availability date can be artificially established well in advance of any intended telecast date with no economic relationship to the networks' need for exclusivity.

No other rationale exists for the choice of availability date rather than telecast date except that, from the networks' point of view, it can substantially extend the real period of exclusivity. Certainly in most cases the telecast date can be determined well in advance. In testimony during the Senate hearings Everett Erlick of ABC indicated that the networks needed six months in order to provide time to plan a sales campaign for a movie telecast date.20/ This testimony shows two things: (1) there is no nexus between exclusivity needs and availability date, and (2) the networks do not lack the ability to establish dates for telecast of films well in advance.

Telecast date is a far more logical point of departure for any discussion of permissible exclusivity. Some people have expressed the concern that if the telecast date were used, a network could announce its telecast date right in

20/ Senate hearings, p. 193.

the middle of a pay cable run, thus requiring the pulling of product from pay cable. However, pay cable is more than willing to take this risk since under the availability date approach, pay cable does not get the product at all. Since it is known that a telecast date can be fixed quite far in advance, we can see no reason why any front-end exclusivity should not be tied to that date. This would actually serve to lessen the possibility of product being pulled from pay cable since plans are made for pay cable exhibition far enough in advance to arrange an orderly schedule on both networks and pay cable.

If NBC is permitted exclusivity 30 days in advance of availability date, instead of a short period before telecast date, pay cable will continue to be squeezed in its three year FCC window between the theatrical run and this unjustifiable network exclusivity.

B. The Duration of Exclusivity is Far More Lengthy Than Needed

The proposed Consent Decree goes on to permit NBC to obtain two years of exclusivity against pay cable after availability date and an additional 12 months for each exhibition beyond the first two showings. Taken together with the availability date provision and the FCC rules,

this term of exclusivity just about completely eliminates any chance for pay cable to obtain good product until it is quite old, if ever. The networks simply have no need for that much exclusivity. The unreasonableness of such a provision stands out like a sore thumb.

The Consent Decree does not require NBC to telecast a film at any time during the first two years of exclusivity which it may purchase. Thus NBC can purchase and warehouse a film with the result that a long period of time may pass when no one is showing the film. Furthermore, one run a year can permit NBC to tie up the film for an indefinite period of time. The Department of Justice was heading in the right direction as indicated on pages 19 and 20 of the Competitive Impact Statement when it suggested that exclusivity be permitted for 45 days before and after each network exhibition. What has instead been proposed is a quantum jump in the wrong direction.

Use of availability date and a minimum of two years of exclusivity becomes even more restrictive when the FCC rules are factored in. Thus a film may be in its theatrical run

for 12 to 18 months and then NBC is permitted to obtain at least two years of exclusivity against pay cable from an early and fictional availability date. In most situations this takes a film past the three year old mark. Certainly the one year renewal rights accorded to NBC would bring the film beyond this age and as demonstrated above, once a film is over three years old, the FCC rules make it impossible for pay cable to purchase the film.

Just as the date of first telecast is an obvious and reasonable front-end exclusivity benchmark, so, too, should exclusivity not be permitted to extend beyond each telecast. It has been alleged that the networks will not purchase films if they can't get extensive pre- and post-exhibition exclusivity against pay cable. In light of the lack of actual competition between the two modes of delivery and in light of the great economic value that feature films have for the networks, it is absolutely inconceivable that the networks will not buy films when they are made available.

Thus the proposed provision is really of very little value to the networks, and it certainly is not needed, but it does have the effect of stifling pay cable by severely interrupting the flow of film product.

C. The Failure to Include NBC Owned and Operated Television Stations is Inexplicable

The Consent Decree should by all rights apply to NBC owned and operated stations. However, NBC has managed to obtain a specific exemption of these stations from any restrictions. It is amazing that such an exemption would be agreed to in light of the network's control not only over its own stations but over its affiliates, as well.

As the Department of Justice is well aware, the FCC is just beginning a wide-ranging inquiry into television network practices. 21/ This inquiry was initiated largely as a result of a rulemaking petition filed by the Westinghouse Broadcasting Company. The Department of Justice supported this petition although it attempted to separate its support for the inquiry from the issues being litigated in its suits against the three networks. The FCC, however, in launching the inquiry, relied not only on the Westinghouse petition and the Department of Justice comments, but also on the allegations contained in the suits against the networks. One of the major issues in the inquiry is the relationship between network owned and operated stations and the program suppliers. 22/ The allegations in the antitrust suits and the issues raised in the FCC inquiry make the exemption of the network owned and operated stations in the proposed

21/ Notice of Inquiry in Docket 21049, FCC 77-53, released January 14, 1977.
22/ Ibid., paragraph 28.

Consent Decree quite inconsistent. NCTA submits that this exemption is unwarranted and untimely.

D. The Discrimination Between Methods of Pay Program Delivery is Not Sustainable

NBC would be permitted under the Consent Decree to obtain the extensive exclusivity against pay cable discussed above but incongruously they are totally precluded from obtaining exclusivity against other modes of paid program delivery, such as video discs, airplanes, hotel pay TV and others. There is simply no rationale for such a distinction.

Some of these modes of delivery reach more people than pay cable. Others, such as video discs, may soon develop into a far more extensive and competitive method of film exhibition. There is no explanation in the Competitive Impact Statement as to why the distinction was made. The only possible explanation NCTA can even imagine is that pay television is the only one of these delivery modes which comes under the jurisdiction of the FCC. If this is the reason, or even part of it, we reject it as totally invalid. The FCC regulates pay television because it can be reached under the provisions of the Communications Act of 1934.23/ The other services cannot be so reached. Surely the jurisdictional parameters of the Communications Act bear no relationship to the applicability of the antitrust laws

23/ The FCC's jurisdiction is one of the issues being litigated in Home Box Office, Inc. v. FCC, supra.

in this case. Indeed, if this were so, the Consent Decree should be written the other way around since NBC should have more to fear from those delivery methods which the FCC cannot regulate rather than those it can.

The Department of Justice has long held the position that it favors competition and innovative alternatives, not the promotion of one or another competitor. The distinction made in the Consent Decree is in conflict with this philosophy. Every method of delivering pay programming is relieved from the burden of network exclusivity except for pay television. Thus the networks are free to exact substantial and unnecessary exclusivity against pay cable.

Put another way, if we examine all of the means of distribution of feature films, such as networks, theaters, pay cable, network owned and operated stations, affiliates, video discs, cassettes, hotel pay service, in-flight movies and bars, pay television (cable and over-the-air) is the only one which can be precluded from showing a film because of a contract provision obtained by another medium. This discrimination has been proposed in the Consent Decree with absolutely no rationale provided. NCTA suggests that the distinction is not defensible.

V. NETWORK EXCLUSIVITY PRACTICES HAVE BEEN UNDER REVIEW IN CONGRESS AND AT THE FCC FOR TOO LONG

The terms of the proposed Consent Decree are unfortunate in that the very exclusivity practices dealt with have been under review both in Congress and at the FCC and nothing has yet come of this activity. Effective action by the Department of Justice is therefore necessary.

The Senate Subcommitte on Antitrust and Monopoly of the Committee on the Judiciary held extensive hearings in 1975 on the precise subject under discussion here. In 1976 the House Subcommittee on Communications of the Interstate and Foreign Commerce Committee held a set of hearings on the broad subject of CATV regulation, and one of the major topics was pay cable. However, nothing concrete is yet on the horizon from this source.

Proceedings at the FCC are more numerous and equally unproductive. The long-pending rulemaking in Docket 18179 explores the duration of time exclusivity found in television contracts.24/ On August 12, 1974, the Commission issued a Further Notice of Proposed Rule Making in Docket 19554,25/ in which they sought comment on the alleged unreasonable

24/ See Second Further Notice of Proposed Rule Making in Docket 18179, 37 Fed. Reg. 7531 (1972).
25/ 48 FCC 2d 453 (1974).

exclusivity obtained by the networks against pay cable. No action was ever taken. Then the Commission seemed to back off still farther by issuing a general Notice of Inquiry in Docket 20402 in 1975. 26/ This proceeding was explained by the Commission as follows:

> The inquiry which we have initiated by this Notice will deal with many of the same issues taken up in earlier proceedings, but will focus on the effects of exclusive contracts upon subscription television vis-a-vis conventional television, and particularly on how these effects relate to our anti-siphoning rules. The basic issue posed in this proceeding is whether the degree of exclusivity now generally contracted for is necessary for the well being of conventional broadcasters, and whether this degree of exclusivity, when viewed in conjunction with the Commission's anti-siphoning regulations, will markedly inhibit the development of subscription television services. (emphasis added) 27/

However, once again, nothing has transpired.

In sum, the FCC has had several proceedings underway for some time now dealing with many of the issues dealt with in the Consent Decree. But none of these proceedings show signs of being concluded in any satisfactory fashion. Thus the Department of Justice is the logical entity to turn to

26/ 52 FCC 2d 87 (1975).
27/ Notice of Inquiry in Docket 20402, para. 6.

for resolution of this issue. In addition, approval by the Department of Justice of unreasonable exclusivity against pay cable will unavoidably place an imprimatur on existing network practices and thereby tend to prejudge or influence the outcome of the issue elsewhere.28/ This risk can only be avoided if the Department of Justice withdraws its consent to the proposed decree.

VI. THE DEPARTMENT OF JUSTICE SHOULD WITHDRAW ITS CONSENT TO THE PROPOSED DECREE

The proposed Consent Decree does not do more than codify existing network exclusivity practices. Approval of these practices seems patently inconsistent with the Department's past attitudes and pronouncements favoring free competition for pay cable. If satisfactory terms cannot be agreed on with NBC, then the Department should continue with its litigation.

The Department has consistently sided with the pay cable industry in its battle against restrictive FCC rules and network practices. Thus, in the lengthy FCC rulemaking in Docket 19554 which resulted in the present restrictions the

28/ This could even be the case in any subsequent private antitrust action. Although Section IV (A) of the Consent Decree contains a caveat about not approving violations of the antitrust laws, the meaning of this proviso is vague. It can reasonably be interpreted, taken in context, that the Department of Justice views those practices specifically enumerated in the Consent Decree as within the boundaries of the antitrust laws.

Department filed two sets of comments which took the position that the FCC should not stifle pay cable because of some hypothetical injury which might befall the broadcasters.29/ After the FCC's unsatisfactory action, the Department filed a brief in support of the pay cable industry in the court appeal.30/ And, in the 1975 Senate hearings, Donald Baker, Assistant Attorney General, Antitrust Division, observed that "the only problem [with the FCC rules] was that most of the affected films were under exclusive contracts."31/ Finally, the entire tenor of the Department's 1976 comments in support of the Westinghouse petition for a network inquiry is one of seeking to preserve a competitive environment. The approval of existing anti-competitive network exclusivity practices simply runs counter to all of this past conduct.

If, for various public policy reasons, the Department still feels that some provision dealing with exclusivity should be included in an overall settlement of the litigation, NCTA suggests that all that is needed by NBC is a short period of time prior to each telecast date. A period of 45

29/ See Department of Justice comments in Docket 19554, filed November 1, 1972, and October 4, 1974.
30/ Home Box Office, Inc. v. FCC, No. 75-1280 et al., Brief for Respondent United States of America.
31/ Senate hearings, p. 234.

days prior to each exhibition was suggested by the Department,[32] but we feel that 15 days is more than sufficient. While a legitimate argument can be made for some pre-exhibition exclusivity, there is no reason for any post-telecast protection. How could a pay exhibition to a relatively small audience harm a prior "free" exhibition to a nationwide audience? This type of approach would give the networks all the protection they really need, while at the same time giving pay cable the access to the product which it must have to survive.

If NBC would not accept such a provision, the Department should continue to pursue the litigation. NCTA believes that the Department should take the position that no network exclusivity against pay cable is appropriate at this time, but at a minimum the Department should certainly not consent to a continuance of existing practices.

VII. CONCLUSION

NCTA submits that the contractual exclusivity obtained by NBC and the other networks against the pay cable industry is an unneeded practice which is anti-competitive in intent,

32/ Competitive Impact Statement, pp. 19-20.

and when taken together with the FCC's rules, is certainly anti-competitive in result. The proposed Consent Decree not only virtually approves existing practices, but it also creates a discriminatory framework between alternative methods of delivering pay programming. The Department of Justice should take a position in opposition to NBC's exclusivity practices, or at least seek an acceptable provision along the lines discussed above. If this cannot be accomplished, NCTA urges the Department to continue this litigation. In any event, the Department should withdraw its consent to the decree as it is now written.

Respectfully submitted,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.

By Stuart F. Feldstein
Stuart F. Feldstein

By Frederick W. Finn
Frederick W. Finn

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March 1, 1977

CONTINENTAL CABLEVISION, INC.
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H. I. GROUSBECK
PRESIDENT

April 20, 1977

Mr. Bernard Hollander, Chief
Judgements and Judgement Enforcement
Section
Anti-Trust Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Hollander:

I urge you to withdraw the support of the Department of Justice for the proposed Consent Decree in the NBC matter. I also urge you, if necessary, to take anti-trust action to prohibit unreasonable contractual exclusivity against pay cable.

Network licenses of films invariably provide for exclusivity against pay cable. This practice sharply limits or denies completely pay cable's access to films. For example, a film may be purchased by a network for only one or two showings, but its contract may provide for exclusivity against pay cable for a period of up to five years.

It is my view that it would be in the public interest for the Department of Justice to move to curtail this highly inequitable and anti-competitive practice.

Very truly yours,

H I Grousbeck

:cm

UA-COLUMBIA CABLEVISION, Inc. · 49 Riverside Avenue · Westport, Conn. 06880 · 203-227-9581

Robert M. Rosencrans
President

April 15, 1977

Mr. Bernard Hollander
Chief, Judgements &
Judgement Enforcement Section
Anti-Trust Division
U. S. Department of Justice
Washington, D. C. 20530

Dear Mr. Hollander:

I would like to add my voice to those who recommend withdrawal of your support to the proposed consent decree with NBC in connection with exclusivity against pay cable.

We believe that the effect of the consent decree would be to reenforce their economic power against our industry and effectively subvert the basic intent of the Justice Department.

We appreciate your concern with this matter and we trust you will give thorough consideration to the views that oppose the consent decree.

Sincerely yours,

RMR:l

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LAFAYETTE, INDIANA 47902

RICHARD F SHIVELY
PRESIDENT

TELEPHONE
317-463-7508

April 13, 1977

Mr. Bernard Hollander, Chief
Judgements and Judgement Enforcement Section
Anti-Trust Division
U. S. Department of Justice
Washington, D.C. 20530

Dear Mr. Hollander:

As an officer and director of Telesis Corporation, operator of Cable TV Systems in nine states, I wish to urge the Department of Justice to withdraw its support of the proposed Consent Decree with the National Broadcasting Company, Inc. in the matter of Pay Cable programming.

Our company has made substantial investments in order to make Pay Cable service available to many of our subscribers. The early acceptance of this service by subscribers has been heartening; however, the future is clouded by the possibility of the lack of availability of programming.

In view of the fact that the U.S. Court of Appeals vacated Federal Communications Commission Pay Cable rules, it appears likely that broadcast interests will make even greater use of their substantial financial advantage in order to obtain as much exclusivity as possible from the moment feature films are released for exhibit. A grant of up to 36 months' exclusivity, as permitted in the proposed Consent Decree, would have the practical effect of completely denying product to Pay Cable until after it is available via commercial television.

This certainly is anti-competitive. It not only restricts, it eliminates a market place. Moreover, it denies the public a right to view, in home, unedited and uninterrupted feature films. It also destroys a new market for feature films.

In the interests of the public, as well as in the interests of fair play, you are beseeched to reconsider your Department's decision and withdraw support from the proposed Consent Decree.

Sincerely,

Richard F. Shively

Richard F. Shively

RFS/rap
cc: Bob Johnson

PROGRESS INTELLIGENTLY PLANNED AND DIRECTED

FOR RESPONSIVE MEDIA:
CITIZENS COMMUNICATIONS CENTER
1914 SUNDERLAND PL., N.W. WASHINGTON, D.C. 20036 (202) 296-423

March 1, 1977

Mr. Bernard M. Hollander
Chief
Judgment and Judgment Enforcement
Section
Antitrust Division
Department of Justice
Washington, D. C. 20538

Re: Proposed Consent Decree in
U.S. v. NBC, Com. Act, No.
74-3601 RJK, U.S. D.C. Cent.
Div. Calif.

Dear Mr. Hollander:

The National Citizens Committee for Broadcasting objects to the proposed consent decree in United States v. National Broadcasting Company, Inc., Civil Action 74-3601-RJK, filed on November 17, 1976 in the United States District Court for the Central District of California.

Our principal concern lies in the proposed exclusive rights permitted NBC to theatrical feature films against their exhibition on pay cable television. [VI(E)(iii)(e)]. This clause unduly burdens the growing pay cable industry by denying it rapid access to feature films that can be brought to consumers without commercial interruption. This clause is inconsistent with the spirit of both the Communications Act and the Federal antitrust laws. Moreover it is contrary to the purpose of the entire antitrust action originally initiated by the Justice Department.

I. BACKGROUND

National Citizens Committee for Broadcasting (NCCB) is a non-profit organization representing consumers of media services. We believe that it is the paramount responsibility of both the Justice Department and the Federal Communications Commission to promote diversity and competition within the communications industry to increase consumer choice. Accordingly NCCB has participated in various F.C.C. rulemakings concerning Pay Cable (Docket Nos. 18893 and 19554). Like the Justice Department's Antitrust Division, we unsuccessfully urged the Commission in those rulemakings to remove the unnecessary and illegal restrictions on the pay cable industry. The artifical constraints (i.e. exclusive contracts) now used by the broadcast industry to deny pay cable access to feature films should, NCCB argued, be entirely abandoned.

Broadcasters, who present their product to the public at no direct charge, through an advertising-based system, are able through their dominant economic position in the communications industry to deny cable television, which would present such product on a paid, but uninterrupted and unedited basis, access to feature films. The FCC failed to deal adequately with this problem in one five year proceeding culminating in Subscription Television Program

Rules, 52 FCC 2d 1, reconsid. denied, 54 FCC 2d 797 (1975).

The Commission rejected the arguments made by NCCB and similar groups, essentially compromising among the contending industries and "gloss[ing] over the more fundamental public interests." NAITPD v. FCC, 502 F.2d 249, 258 (2d Cir. 1974). A new "inquiry" has been initiated into the practice. Docket No. 20402; 40 Fed. Reg. 15576 (1975). But before the Commission can make a final resolution of the problem it must first issue a formal notice of rulemaking.

This action (or rather inaction), along with other Commission restrictions placed on the pay cable industry, is on review by the United States Court of Appeals for the District of Columbia Circuit. The case was argued last spring and is now awaiting decision. Home Box Office v. FCC, D.C. Cir. No. 75-1280. Both Justice and NCCB supported the petitioning cable entities in their own briefs and arguments in this case. NCCB's principal arguments were that the restrictive cable rules as well as present practices of the broadcast industry vis-a-vis pay cable undermine the public's paramount First Amendment interest in access to diverse sources of information and entertainment, as well as national antitrust policies embodied in the Communications Act. We believe strongly that the Court will reverse and remand this case to the Commission to reconsider these important issues.

II. THE PAY CABLE EXCLUSIVITY PROVISION IN THE CONSENT DECREE:

Section VI(E)(iii)(a)-(d) of the decree prohibits NBC from entering into exclusive contracts with motion picture producers that deny feature films during the run-of-the-contract to theaters, closed circuit television in hotels, airline showings, and video discs. But VI(E)(iii)(e) specifically exempts from this restriction exclusive contracts which deny pay cable access to feature films. This provision in effect formalizes past industry practice by allowing NBC to obtain exclusivity against pay cable. Allowable exclusivity commences 30 days prior to the first network availability date and extends until the termination of the agreement or 24 months, whichever occurs first. Moreover, 12 additional months of protection is granted for each additional exhibition beyond two obtained by the network.

The Antitrust Division has itself recognized the potentially adverse effects of this current industry practice, and originally sought to limit it sharply (CIS at 19-20). In the Consent Decree however the Department abandoned its original proposal of limiting exclusivity to 45 days before and after each network exhibition date (90 day exclusivity) and acceded to NBC's demand to institutionalize the present exclusive contract against pay cable as an "upper limit" (Id. at 12). The provision could, however,

have the effect of denying pay cable access to specific feature films for an indefinite number of years. For as Variety recently noted, acceptance of this provision by the Court "could have the practical effect of etching them in stone in D.C." (November 24, 1976 issue)

This provision unduly restricts competition between different forms of communications media. It provides the networks with a mechanism to insure that their dominant position in the communications industry is not disturbed, and thus disserves the public interest. For the following reasons NCCB urges the Justice Department to either re-negotiate real relief (the 90-day exclusivity limit) or, if that is not possible, entirely eliminate this provision from the consent decree:

1. The proposed provision simply codifies the present network practice in obtaining exclusivity protection. It does not constitute a true compromise since the former practice of obtaining exclusivity from the date of contract has been entirely abandoned. Moreover, in light of anticipated adverse reaction in Congress and the FCC, led by the cable industry and public interest groups, it is unlikely that date of contract exclusivity will be reinstated in the near future. Any compromise in this important area should provide substantial or significant relief to the pay cable industry. An equitable solution would be the acceptance of a provision much more along the lines of the original Justice

Department proposal of granting exclusivity protection 45 days before and after each network exhibition of a feature film (e.g., 60 days before and after).[1/]

2. If the Antitrust Division cannot negotiate a genuine restriction on exclusive contracts -- and we believe that it has failed in its efforts to do so -- then the provision in the consent agreement should be entirely eliminated. It would be legally, psychologically and tactically wrong for the Justice Department to acquiesce to the present network exclusivity practice which limits the availability of films to pay cable. Ultimately, the Department's acceptance of this unduly permissive standard could influence whatever action the Congress, the FCC or some future court in a private antitrust suit might be disposed to take.

3. This brings us to our final request -- namely, that the division should make clear in the decree itself that any provision, even the proposed limited 45-day restriction, should not in any way determine or influence Congressional or FCC consideration of the exclusivity matter.

1/ The FCC rules now provide that feature films more than three years old can be made available for pay cable use only when a conventional television station in the market or a network has a "present contractual right to exhibit the film." Therefore, "a film under contract but which is not available for exhibition until some future date, will not be considered as available for telecast." In our view and that of the Department in light of its position in the Home Box Office v. FCC appeal, this rule is of dubious legality, and therefore should not influence or affect the outcome of this antitrust suit.

The Division's action is simply a compromise resolution of an antitrust suit. Congressional and FCC action involves the much broader consideration of what course best promotes the public interest. We of course recognize that this is true whether or not it is specifically acknowledged in the CIS or decree process. It is important, however, that the process reflect this critical consideration. The Competitive Impact Statement (at 12) goes to great pains to point out that the exclusivity provision "should not affect those situtations where NBC does not now obtain such exclusivity for feature films". It should be similarly explicit as to its immateriality towards Congressional or FCC consideration of exclusive contracts.

III. Other Decree Provisions

While the foregoing constitutes our most serious objections, there are other features of the proposed decree which warrant comment and possible reconsideration by the Antitrust Division. The government states (CIS at 15) that "the agreed relief would be substantially equivalent to that sought in the complaint....". We question whether the relief granted meets this high standard. But more seriously, there is a substantial question whether the relief constitutes a genuine compromise at all in the following respects:

A. Internal Network Program Production.

In recognition of the networks' dominant position, coupled with the obvious incentive for the networks to prefer their own productions over independent offerings, the Division originally sought to prohibit all internal production of entertainment programs. Internal production cuts down on opportunities available for outside producers, and equally important, gives the networks additional leverage in dealing with independent production companies. Any compromise that left leeway for internal network production would not be effective in eliminating the leverage aspect. But it could make a significant contribution in increasing opportunity for independent producers. However, the Division's proposed decree fails to achieve even this goal, because it permits internal production figures greater than that now undertaken by NBC.

This provision is thus again not a genuine compromise but rather an institutionalization of the present network levels (generally using the high water marks of each network in particular time segments as the bellweather).

B. Yearly Option Renewal Provisions To Program Series

Similarly, there is a serious question as to the public interest basis for the option provisions of the decree [VI(E)(i)]. These limit exclusive yearly options in a contract for a network series to no more than four years, plus a single year's extension if the contract is to be renegotiated.

As noted in the Competitive Impact Statement (at 11) NBC can now obtain, and has obtained, " exclusive rights to a program for as long as seven years on terms and conditions set before the program has ever been developed." But generally the networks today obtain only five years of options for a prime time series . A provision much more in the Government's favor would be two years (as the Justice Department initally proposed -- CIS at 17). A genuine compromise would be three years, with a single year's extension upon renegotiation of the original contract.

C. Exclusivity In Program Series

A final example involves the exclusivity provision in VI(E)(ii), limiting NBC's right to prohibit the use of a particular prime time program (not a theatrical movie) to no more than three years. NBC may, however, obtain four years of exclusivity as against non-prime time stripping of a particular series, and unlimited prime time exclusivity during

the life of NBC's right to network exhibition of the program. Again we recognize that this is a significant cut-back. But it should be considered in light of two important considerations: First, there is clear evidence that non-prime time presentation of older episodes has no effect on the ratings of the new episodes in the networks' continuing prime time showings. Secondly, the struggling UHF independent has a great need for access to such off-network series if it is to succeed. Indeed, the public interest strongly militates against any exclusivity barring non-prime time presentation by UHF independent stations.

Here, as in the exclusivity as against feature films, we recognize that these provisions were "the subject of intense negotiations between the parties", (CIS at 17). It can be argued that we simply are insisting on different judgements concerning the outcome of the negotiations -- that, like Oliver Twist, "we want more". However, we do not regard the Government's trial position as weak in light of the network's record of dominance of the broadcasting industry. We strongly believe that any consent decree should reflect genuine compromise -- not just provisions that are really only ceilings retaining present industry custom.

Again, we stress that the decree process should clearly reflect that there is no intent to affect in any way future FCC or Congressional consideration of the areas covered by the compromise. In each specific matter covered by the decree, the FCC has clearly been delegated jurisdiction to regulate. The FCC is not only mandated to regulate to alleviate undue anti-competitive restraints. It must also promote "the larger and more effective use" of television in the public interest. 47 U.S.C. §303(g); NBC v. United States, 319 U.S. 190 (1943). We urge that the consent decree be adjusted consistently with the above points, so as to maximize the public's access to diverse information sources, and not limit, directly or indirectly, the ability for other governmental entities to do the same.

Respectfully submitted,

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WHY WAS A CONSENT DECREE PROPOSED AS SETTLEMENT AGAINST NBC NETWORK IN JUSTICE DEPARTMENT'S ANTI-TRUST SUIT PERMITTING NETWORK TO ACQUIRE RIGHTS FOR TWO SHOWINGS OF MOVIES WITH TWO YEAR EXCLUSIVITY, AGAINST PAY CABLE-ADDITION YEAR OF EXCLUSIVITY FOR EVERY ADDITIONAL EXHIBITION. THIS SHOULD BE DELETED FROM FINAL AGREEMENT ALSO WHY DOESN'T AND WHEN WILL JUSTICE DEPARTMENT TAKE FULL AND FORCEFUL ACTION AGAINST NBC, CBS, AND ABC BROADCASTING NETWORKS, AND TO PARTICIPATE IN THIS ACTION WITH THE FTC. CORDIALLY

CC: REP FRANK ANNUNZIO WASHINGTON DC
PRESIDENT JIMMY CARTER WHITE HOUSE WASHINGTON DC
OAK INDUSTRIES, 100 S. MAIN ST, CRYSTAL LAKE IL. 60014
ATTN: RMLS OF C.A.T.U. DIV. MR WERNER KOESTER

BURTON BENGER
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16:10 EST

MGMCOMP MGM

Response to the Comments Submitted by Congressional, Public Interest and Pay Cable Television Entities Opposing Section VI(E)(iii)(e) of the Proposed Judgment. 1/

Paragraph VI(E)(iii)(e) has been deleted from the proposed Judgment by agreement of the parties. It would have limited NBC's network program exclusivity for theatrical feature films as against pay cable television, and received, by far, the largest number of comments filed on the proposed Judgment.

The relief proposed in this provision was simply intended to establish an upper limit on the exclusivity terms that NBC could obtain, at a level lower than current practice, rather than a determination of what period of network exclusivity would be reasonable under the Sherman Act. Despite this intent, and the fact that the Judgment does not constitute an "adjudication of fact or law," the commentors almost uniformly protested that this provision would establish an industry standard which they believed to be detrimental. Thus, for example, one comment stated:

> The proposed decree . . . expressly approves NBC's practice of demanding unreasonable exclusivity against pay cable . . . [and] would put the Department's imprimatur on precisely the type of network abuse that this suit was brought to prevent. 2/

1/ The following entities filed comments on Paragraph VI(E)(iii)(e): Cinemerica, Inc.; Schuyler Chapin, Dean, School of Arts, Columbia University in the City of New York; East Bay Skills Center; NCCL; The National Urban Coalition; American Civil Liberties Union; NAACP Legal Defense and Educational Fund, Inc.; Action for Children's Television; Metropolitan Opera Association; Nicholas Johnson; American Television & Communications Corp.; Cablecom-General, Inc.; Cable Information Systems, Inc.; Central California Communications; Communications Properties, Inc.; Continental Cablevision, Inc.; Cox Cable Communications; Daniels Properties, Inc.; Good-Vue CATV, Inc.; Harris Cable Corporation; Heritage Communications, Inc.; Home Box Office, Inc.; Inertia, Inc.; Liberty Communications; Manhattan Cable Television; Midwest Video; Sammons Communications, Inc.; Tele-Communications, Inc.; Telesis Corporation; Teleprompter Corporation; The TM Communications Company; UA Columbia Cablevision, Inc.; United Cable Television Corporation; Vision Cable Communications, Inc.; Honorable Edward M. Kennedy, Acting Chairman, Committee on the Judiciary, Subcommittee on Antitrust and

1/ continued

Monopoly, United States Senate; Lincoln Center for the Performing Arts, Inc.; Community Coalition for Media Change; Optical Systems Corporation; Communications Policy Committee, Consumers Union; United States Conference of Mayors; Media Access Project; Cable Television Information Center of The Urban Institute; United Artists Corp. and Metro-Goldwyn-Mayer Inc.; Honorable James Abourezk, United States Senate; National Cable Television Association, Inc.; Citizens Communications Center; and Burton Berger.

2/ See Comments of Twenty-Four Companies in the Pay Cable Industry at 8.

This view of the effect of the proposed Judgment was shared by a number of other commentors. 3/ In addition, some of these commentors presented analyses to the effect that the present exclusivity terms in network contracts constituted an unreasonable restraint of trade and reflected an unreasonable exercise of network purchasing power to foreclose competition. 4/

The commentors, while unanimously agreeing that Paragraph VI(E)(iii)(c), as written, was detrimental to the developing pay cable industry 5/, did not fully agree on the solution. While some would have the Government obtain a complete ban on such exclusivity, or at most permit it to run only for 15 days in advance of the feature's playdate and permit no exclusivity

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3/ See, e.g., Comments of Senator Edward M. Kennedy at 1; Comments of United Artists Corp. and Metro-Goldwyn-Mayer, Inc. at 7; Comments of the National Cable Television Association, Inc. at 27; Comments of Nicholas Johnson at 2; Comments of Citizens Communications Center at 5.

4/ Comments of Twenty-Four Companies in the Pay Cable Industry at 8, 23-24; Comments of the National Cable Television Association, Inc. at 7-16.

5/ It should be noted that CBS Inc. and American Broadcasting Companies, Inc. oppose entry of the entire Judgment and entry of this provision. Their comments are treated separately.

after playdate 6/, others recommended that the provision be deleted from the Judgment entirely, since no factual record on what constituted reasonable exclusivity had as yet been developed in this case. 7/

As a result of the numerous assertions that this provision would establish a standard adversely affecting the pay cable industry, the Government became convinced that it would not provide meaningful relief. And, since no agreement on a more limited period for this type of exclusivity could be reached with NBC, the Government seriously considered withdrawing its consent to entry of the Judgment. However, in a recent decision the District of Columbia Court of Appeals, citing "antitrust questions," has ordered the FCC to consider and resolve this problem within 180 days. 8/ Consequently, it

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6/ See, e.g., Comments of Twenty-Four Companies in the Pay Cable Industry at 44; Comments of the National Cable Television Association, Inc. at 29; Comments of Senator James Abourezk at 4.

7/ Comments of Senator Edward M. Kennedy at 1; Memorandum of Majority Staff, Senate Antitrust and Monopoly Subcommittee at 9; see Comments of the National Citizens Communications Lobby at 2; Comments of the American Civil Liberties Union at 3; Comments of American Television & Communications Corporation at 3; Comments of Cable Television Information Center at 4.

8/ Home Box Office, Inc. v. FCC, No. 75-1280 (D.C. Cir. March 25, 1977).

was decided that outright removal of this provision would be appropriate and desirable as well, because its deletion would permit entry of the remainder of the Judgment. The parties have stipulated that removal of this provision does not estop any possible future action in this area against NBC by any person, and does not constitute any evidence or admission respecting any issue of fact or law. 9/

9/ The Stipulation, in pertinent part, provides:

> . . . the original inclusion and subsequent deletion of Section VI(E)(iii)(e) from the proposed Final Judgment, shall not estop plaintiff or defendant, or any person, in this or any other action or proceeding, from asserting any issue of fact or law as to the subject matter of Section VI(E)(iii)(e) or as to the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, nor shall they constitute any evidence or admission as to any such issue.

Bernard M. Hollander

Bernard M. Hollander

Attorney for the United States

Form OBD-183
12-8-76 DOJ

• THE CAUCUS •
FOR PRODUCERS, WRITERS & DIRECTORS

January 11, 1977

Bernard Hollender, Esq.
Chief of Judgment & Judgment
Enforcement Section - Antitrust Division
U.S. Department of Justice
10 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Re: USA v. NBC - Civil Action #74-3601 R.J.K.

Dear Mr. Hollender:

The Caucus of Producers, Writers and Directors is a non-profit organization, organized four years ago, and dedicated to constructive progress and improvement in the television and theatrical fields; and to protect the high standards and integrity of Creative Artists. Its membership includes the most important and prestigious segment of the Creative Community. A copy of volume 1 of Caucus Comments, just issued, which embodies the aims and objectives, and the current membership list of the Caucus is enclosed.

The Caucus has studied the proposed Judgment in connection with the above matter, and vigorously opposes said Judgment. Enclosed is a memorandum which the Caucus requested its attorneys (Simon & Sheridan) to prepare for submission to you. You will note that the Caucus recommends that the Anti-trust Division withdraw its consent to said proposed Judgment.

If there is any additional information you wish to obtain from the Caucus, please contact us, or our attorneys, Simon & Sheridan (2404 Wilshire Boulevard, Los Angeles, California 90057).

Respectfully submitted,

Charles W. Fries

CF:g
enc.

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ALAN D. COURTNEY
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GEORGE EGNSTEIN
NORMAN FELTON
ED HUNTLEY
JAMES KUMAR
NORMAN LEAR
JOHN MANTLEY
VIC MORROW
AARON RUBEN

Re: United States of America v. National Broadcasting Company, Civil Action No. 74-3601 RJK
The Proposed Final Judgment

One of the principal aims and objectives of the Caucus of Producers, Writers and Directors is that the Networks completely cease all production and syndication activities of entertainment programs.

The Steering Committee and the Executive Committee of the Caucus has reviewed the complaint issued by the Justice Department against NBC and the proposed Judgment. Like so many other substantial representatives of Independent Television Program Suppliers, the Caucus vigorously opposes the Judgment which is proposed by the parties to settle the Government's antitrust action against NBC.

The complaint alleged that NBC, its O & O's, affiliates, and others, entered into contracts and unreasonable restraint of trade and commerce in connection with television entertainment programs exhibited during prime-time hours; that NBC was monopolistic; and that complaint sought to prohibit NBC from exhibiting programs (and feature films) produced by NBC or other networks, from obtaining any interest (except for the first-run exhibition rights) in television entertainment programs produced by others, to prohibit NBC from engaging in any syndication, to prohibit NBC from using its control to foreclose competition or obtain an unfair advantage in any other field; and the Government sought divorcement, divestiture, reorganization and injunction with respect to the business and properties of NBC. The Government complained that NBC's offenses included ownership and control of TV entertainment programs during prime-time hours, that competition with respect to production, distribution and sale of such programs was unreasonably restrained, and the viewing public has been deprived of the benefit of free competition in the broadcasting of such programs.

The proposed judgment filed November 17, 1976, which is scheduled to become final soon, would sanctify and approve for all three Networks, the right to engage in the very practices which the Government's action against all three Networks sought to eliminate. Such Judgment approves the continued production of entertainment programs by NBC, extensive and restrictive options, unreasonable exclusivity, creative controls which restrict outside Program Suppliers and the continuation of other exercises of the powers inherent in the current Network structure and methods of conducting its business.

The foregoing complaints are general in nature. A review of the specific provisions of such proposed Judgment magnifies the Government's failure to achieve its aims and goals as provided in its complaint. Please note the following:

1. The Judgment recognized that for a period of ten years, NBC may broadcast in network time, programs obtained from sources other than Independent Program Suppliers as follows:

Prime time- two and one half hours per week
Daytime- eight hours per week
Fringe hours- eleven hours per week.

In addition, NBC may arrange for two specials, which are not obtained from independent program suppliers, during each six month period.

To the best knowledge of the Caucus, the number of hours of programming now actually owned and produced by NBC, or on its behalf, is less than the hours permitted by said Judgment. This certainly points up real retrogression rather than progress in the achievement of the Governments aims as provided in its complaint.

2. The limitation of the number of years of options that NBC may acquire from an independent program supplier to 4 or 5 years, seems to be a step in the right direction, until one reviews the usual life of at least 90% of the TV series produced. The substantial number of series are dropped by NBC after one or two years of broadcasting. If a series survives the second year and is picked up for a third year, such Independent Supplier generally is in a position to renegotiate its deal, so that said supplier obtains more money and more favorable rights for such long running series.

3. The proposed Judgment appears to give Independent Program Suppliers greater latitude with respect to the Networks' option hold on projects not selected by the Network for series purposes. In fact, it does not. 65% of the pilots which are not picked up by the Network for series purposes are released subject to certain completely onerous conditions. The date of the Networks' continued hold for series purposes and the Suppliers obligation to repay the pilot costs to the Network, make this provision completely inequitable and impractical for such Suppliers.

4. The rights which NBC may acquire from such Suppliers include the recognition of NBC's approval of creative elements and program content. One of the major complaints by the Caucus and the Creative Community against the Networks has been the Networks' substantial abuse of such creative control and approvals. The continued recognition of such power and authority continues to adversely affect the Creative Community in the proper exercise of creative control by such Independent Supplier.

There are many other provisions of said propsed Judgment, which are inappropriate and inequitable. They include the reference to the required use of Network facilities under certain circumstances, syndication (already a dead issue since these limitations were agreed to by Agreement wit'i FCC some time ago), and restrictions against reciprocal deals between the Networks (which adds nothing, because such deals do not exist and because the competition between the Networks probably is too great to permit this).

In our opinion, this Judgment does not protect the Independent Program Supplier in any material manner, and yet, some of the basic provisions of this Judgment are conditioned upon the Justice Department obtaining a similar agreement from ABC and CBS.

A review of several of the recent newspaper and trade paper reports of the settlement of this Antitrust suit are interesting. As an example, the New York Times, on November 19, 1976, states "NBC gave little away", the article pointed out that "the prohibitions detailed in the agreement scarsely alter present business practices and are expected to have no significant economic impact on the Network itself and on the television production industry"

The weekly Variety issue of November 24, likewise reported on this proposed Judgment. Its headline read "NBC Discovers that Justice is Blind", and its subheading was "Gave Uncle Sam its 11th Toe in Decree". The Variety report stated "early indications are that NBC may have pulled off a coup last week when it signed a consent agreement with the Justice Department". The article further reported, : "In pacting with the Justice Department, NBC has agreed to rules already on FCC books, ceilings on internal production it does not expect to meet, inconsequential prohibitions and some minor concessions concerning contracts for series shows and options for pilots. In short, the network appears to have lopped off its 11th toe for Uncle Sam." The pact provides NBC with "peace of mind at the network with minimum sacrifice".

The Weekly Television Digest of November 22, reported that NBC told TV affiliates board that the settlement will have "no major financial impact" on the network.

Copies of the three reports referred to above are attached.

We join the Television Industry and the Independent Program Suppliers in viewing this proposed Judgment in the Government's Antitrust actions against NBC, as being inequitable, and one that must be vigorously opposed for the good of the Industry, and urge the Government to withdraw the proposed Judgment.

Dated: January 12, 1977

SIMON & SHERIDAN
2404 Wilshire Boulevard, Suite
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(213) 380-3330
(Attorneys for the Caucus)

SS:ls

ences.

Samuel Simon

NBC Is Seen as Giving Up Little In Settlement of Antitrust Suit

Continued From Page D1

tertainment programs it puts on the air.

In fact, all three networks were forced out of the syndication business by the Federal Communications Commission two years before the Justice Department suit was brought the second time (it had been dismissed without prejudice in November 1974, when the networks fought it as a mischievous action by the Nixon Administration, but was reinstituted a month later under the Ford Administration).

CBS this season has owned three prime-time programs—"Hawaii Five-O," "Spencer's Pilots" and "Ball Four" (the last two already cancelled, or two and one-half hours a week—and one daytime serial, "Love Of Life").

ABC has owned a number of made-for-television movies in prime time but owns no weekly series. The daytime properties it owns are "One Life to Live," "All My Children" and "General Hospital," which consume 10 hours a week.

It also produces "Good Morning America" 10 hours a week, but that early-morning entertainment program could probably acquire an exemption from the proposed quota for prime-time by being designated a news and public affairs show, like NBC's "Today."

The competitive distinction frequently depends on whether the program is produced by the network or by an independent producer. It is a small line from transfer the jurisdiction from one unit in the company to another.

Under the settlement agreement, most of the program ownership provisions will not go into effect unless ABC and CBS are also subject to them. That would depend on their accepting the terms in separate settlements of their own or on their losing the Justice Department suit.

Although conceding that what NBC has accepted as restrictions are on the whole economically useless, network officials confidentially, officials of ABC and CBS said they would continue to challenge the suit as lacking in merit.

They are also contesting the Justice Department's assumption of initial jurisdiction over an industry that has been statutorily the responsibility of Federal regulatory agency, the F.C.C.

Motions to dismiss the case, filed by both networks last November, are still pending.

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have the highest profit margin.

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ministration than occurred in the re-

Continued on Page D10

NBC Is Seen Giving Up Little in Settling Antitrust Suit

By LES BROWN

NBC gave little away in its agreement with the Department of Justice to settle a two-year-old antitrust suit against the networks. The prohibitions detailed in the agreement [illegible] would [illegible] to have no [illegible] on the television production industry—if and when the restrictions go into effect.

Economic Analysis

Knowledgeable observers point out that NBC would not have sought the settlement, but would have continued to contest the suit on principle, along with ABC and CBS, if it felt the terms were [illegible] to its business.

If anything, NBC stands to gain from the settlement [illegible] in being freed from the courts and in saving [illegible] legal fees that could run to hundreds of thousands of dollars. [illegible] the settlement [illegible] NBC's [illegible] business.

Generosity of Settlement

For instance, the agreement would limit the entertainment programs produced by NBC, or in which it held a financial interest, to two and a half hours a week. At present, the only prime-time series owned by NBC is "Little House on the Prairie," which requires twenty hours a week.

NBC thus would be permitted to add to its program holdings, under a suit that was intended to keep the networks from favoring program series for their schedules in which they had a financial interest.

Similarly, the network would be restricted under the agreement from owning more than eight hours of daytime programs a week, during the hours between 9 A.M. and 6 P.M., although as of now it owns none.

A reason for the apparent generosity of the settlement agreement is that the Justice Department's case was based on data from the years before the suit was first filed in 1972.

Forced Out of Syndication

The department's research covered a period when it was common practice for the networks to seek a share of ownership in virtually all programs it purchased from independent producers, along with syndication and other ancillary rights.

Since then, network business has been conducted differently, and what NBC has agreed to in its proposed settlement of the antitrust suit fairly conforms to the current patterns of program selection and purchasing.

One of the more ludicrous provisions of the settlement is a prohibition against the network's acquisition of the lucrative syndication rights to the en-

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A scene from "Little House on the Prairie," the only primetime program produced on television by NBC.

11/19/76 NY Times

Wednesday, November 24, 1976 VARIETY RADIO-TELEVISION

NBC DISCOVERS THAT JUSTICE IS BLIND

GAVE UNCLE SAM ITS 11th TOE IN DECREE

By PAUL HARRIS

Washington, Nov. 23.

Early indications are that NBC may have pulled off a coup last week when it signed a consent agreement with the Justice Dept. concerning primetime entertainment programming practices. While offering few concessions to current biz methods, the web has not only been relieved of the uncertainty and expense of a protracted antitrust suit, but has obtained unprecedented Government approval of the concept of exclusivity against pay cable.

In pacting with the J.D., NBC has agreed to rules already on FCC books, ceilings on internal production it does not expect to meet, inconsequential prohibitions and some minor concessions concerning contracts for series shows and options for pilots. In short, the network appears to have lopped off its 11th toe for Uncle Sam.

What's more, buried deep in the lengthy agreement is a promised upper limit to be penned in future pic contracts concerning exclusivity against feevee. The web in the future may insist on exclusivity extending only from 30 days prior to first availability date and lasting no longer than 24 months.

To be sure, the provision would eliminate any tendency to warehouse pix for long periods — the subject of anguish in Washington including four days of hearings last year before the Senate Antitrust Subcommittee. In this network's case, it would cut in half the 60 days of exclusivity before the availability date normally included in its contracts.

Engraved In Stone — Maybe

But the provision also establishes Governmental approval of exclusivity against pay-cable both in concept and time, something that feevee entrepreneurs would prefer to avoid. The terms are comfortable enough for NBC — Justice had initially proposed that exclusivity last only 45 days before and after each network exhibition of a film — and approval of the agreement by L.A. District Court Judge Robert Kelleher could have the practical effect of etching them in stone in D.C.

Although nothing in the pact prevents the FCC from making any rules on the subject, the rockiness of that agency's rulemaking procedure are such that it is not likely to do so if major parties are satisfied.

The provision also demonstrates the importance of the JD-NBC pact for providing peace of mind at the network with minimum sacrifice. It's particularly significant because most of the onerous-looking provisions would not become effective unless identical terms were extracted from ABC and CBS, either through similar consent agreements or by a Government victory in its antitrust suit. ABC says it has no intention of signing and CBS toppers haven't made up their minds.

Room For Expansion

One such provision would limit the amount of entertainment programming the web may pro-

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NOVEMBER 22, 1976 VOL. 16, NO. 47

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Broadcast

NBC-JD ANTITRUST ACCORD won't have financial impact, network assures Affiliates' Board. Most major provisions aren't effective pending settlement of suits against CBS & ABC, which vow to continue fight. (P. 1)

NETWORK CHILDREN'S TV revenues rise in 1975 despite NAB 24' Code restrictions. NBC shows 'most dramatic' increase, CBS least, in study by House Communications economist Pearce. (P. 2)

1977 CATV RULES on franchising & certification postponed a year, rulemaking started. Hassle over controlling MATVs in prospect. (P. 3) More details of definition proposal. (P. 9)

'ROUCHER SLEDDING' ahead for broadcasters under Carter, Hooks tells NAB fall conference. Frey says TV-radio won't have high priority. (P. 3)

BACKE WON'T BE SPOKESMAN for industry, he tells CBS Affiliates' Board. NBC affiliates commend network for improved pre-screening procedures. (P. 3)

GOVT. RURAL TV LOANS get boost at conference on broadband service. Cable-phone cross-ownership prohibition is criticized. Goldmark discounts cable's rural potential. (P. 4)

CPB-PBS DISAGREEMENT again flares, as PBS boards denounce CPB program decisionmaking, 'wasteful bureaucracy.' (P. 6)

Consumer Electronics

VTR STANDARD WAR simmers down to JVC's VHS system vs. Sony's Betamax. Matsushita, Hitachi, Sharp now have at least partial commitment to VHS. Sony denies copyright law violations. (P. 7) Betamax Shortage seen probable by Jan., supply tightening as ad campaign fuels record 5,000-unit month. Cassette changer due in mid-Jan. (P. 11)

TV INTERFERENCE susceptibility rulemaking planned by FCC in 'next year or so,' claims it has authority. TV makers angered at FCC statements, say better methods are needed. (P. 8)

TED VIDEODISC player & changer make U.S. debut in NTSC format. (P. 9)

PROJECTION TV awaits breakthroughs, commercial & technological. Magnavox & Admiral still studying. Hughes Aircraft active. Sega naming distributors, goes nationwide next fall. (P. 10)

CB WAIVER 'ERRATA' explains that new 23-to-40 testing tolerance is tighter than originally indicated. Rulemaking on proposed 100-db harmonic suppression limit is issued. (P. 11)

GE'S NEW CB models will be shipped to retailers from bonded warehouses on first business day of Jan. Dullmeyer sees wholesale CB dollar volume next year climbing 10%. (P. 11)

NBC—ANTITRUST ACCORD WON'T CHANGE THINGS: Day before it signed consent decree Nov. 17 with Justice Dept. (JD) settling Dec. 1974 program antitrust suit (Vol. 14:50 p2), NBC told TV Affiliates' Board settlement will have "no major financial impact." Lawyers we talked to agreed almost unanimously; network program suppliers were chary about any comment at all.

CBS & ABC--facing identical suits—are incensed that NBC "capitulated," as a network official put it, and both vowed they'll continue fight. Now pending in L.A. Dist. Court are CBS & ABC petitions to dismiss suit as "lacking merit"—but NBC's action is said to have hurt their cause tremendously. Although NBC's settlement had been expected (Vol. 16:46 p5), JD agreed that no negotiations presently are underway with other 2 networks. (Note: NBC also recently split from CBS & ABC in refusing to appeal family viewing decision [Vol. 16:46 p2].)

Meeting in Barbados last week (see p. 3), NBC also told Affiliates' Board that JD agreement merely codifies existing practices and will "cause no major changes in our way of doing business." In formal statement, NBC said settlement could "ultimately establish industry guidelines"—since most major provisions against NBC don't become active unless & until they're also applied to ABC & CBS—and that "we are pleased that this litigation...is now over, so far as NBC is concerned. By taking the lead in entering into this new charter, NBC continues its efforts to advance constructive relationships in the industry..."

Suit—charging anti-competitive program practices—first was brought in 1972 by Nixon Administration, was dismissed in Nov. 1974 by L.A. Court "without prejudice" to refiling after networks contended it was politically motivated. Ford Administration immediately refiled nearly identical suits against all 3 networks within month. Among major provisions of NBC-JD settlement which won't be effective until "similar relief" is obtained against ABC & CBS (news, public affairs & sports are exempt):

(1) Limits NBC to production of 2-1/2 hours of prime time programs per week for 10 years (network now produces only one hour, "Little House on the Prairie"); CBS now does one hour (after canceling 2 programs recently), ABC only made for TV movies, no series. NBC also would be allowed to produce 2 special programs every 6 months in prime time, 8 hours per week in daytime, 11 hours in fringe.

(2) Limits "exclusivity" to network series to 4 years (now generally 5) and restricts rental of facilities for production to year—both with right to renew for year. Both restrictions are for 15 years. (3) Prohibits NBC for 10 years from retaining "exclusive options" to more than 35% of programs not put into schedule. (4) Limits exclusive rights to "spin-offs" for 10 years. (5) Restricts use of repeats "to the same year as that in which the initial episodes...are broadcast," with several exceptions.

JD said provision limiting exclusivity of program series to 4 years was subject of "intense negotiation." Govt. originally sought 2-year option period and several other alternatives were discussed and rejected.

Consent decree is to become effective in 60 days (it was filed in L.A. Court Nov. 17) and a major provision that takes effect then—without waiting for decision on CBS & ABC suits—restricts NBC's exclusivity for movies against pay TV (over-air & cable), cassettes & video discs. NBC can't obtain exclusivity more than 30 days prior to first telecast or beyond last telecast; in all cases, such exclusivity is limited to 2 years for 2 runs, another year for each additional airing. JD first proposed to limit any exclusivity to 45 days before & after each network airing, said it accepted compromise because it would "eliminate any possibility that NBC can warehouse feature films for a number of years." Judgment also prohibits NBC from engaging in domestic syndication (already prohibited by FCC).

Justice said order was signed because "the only meaningful relief that can be obtained short of restructuring the networks is to limit network program production and restrict the program rights that each network may obtain from outside suppliers...This should minimize NBC's incentive to select a program on the basis of financial interests in it." Under order, NBC is required to furnish its officers & directors (for next 10 years) list of all independent program suppliers as published in then-current Television Factbook.

NETWORK CHILDREN'S PROGRAMS UP—Despite 1974 NAB Code restrictions, prime-time commercial minutes allowed during weekend and early evening children's programming, all 3 TV networks showed increases in gross ad revenues for total children's programming time in 1975, according to report prepared by House Communications Subcommittee economist Alan Pearce. During same year, production costs rose "only marginally," Pearce said, adding that for 1976, despite further reductions in children's ad time, both revenues and profits are expected to be "much greater." Pearce will present report at Action for Children's Television Conference this week in Cambridge, Mass.

While at FCC Office of Plans & Policy in 1975, Pearce predicted in internal report that reduction in children's ad time wouldn't harm networks financially because as number of minutes available decreased, price would increase (Vol. 14:40 p2). FCC relied on Pearce's study in 1974 report & policy statement (Vol. 14:43 p2). CBS Bcst. Group Pres. John Schneider subsequently said Pearce was "wrong, terribly wrong," stating in May 1975: "The reduction... has been costly to the industry in general and CBS in particular" (Vol. 15:20 p4). Schneider declined for "competitive reasons" to reveal CBS children's show profits to House Communications Subcommittee 2 months later (Vol. 15:29 p1).

According to Pearce's latest study, gross revenues for 3 networks combined—for both regularly-scheduled and special children's programs—"reached an all-time high in 1975" of

NOTICES

25119

THE CAUCUS FOR PRODUCERS, WRITERS & DIRECTORS

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FINANCIAL:
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PUBLIC RELATIONS:
Jason Levine & Associates

DECEASED MEMBERS

Tony Barrett

Rod Serling

Martin Rackin

David Friedkin

[illegible]

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March 1, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: United States v. National Broadcasting Company, Inc., Civil No. 74-3601 - RJK, U.S.D.C., C.D. Cal.

Dear Mr. Hollander:

We represent United Artists Corporation and Metro-Goldwyn-Mayer Inc. in connection with the proposed consent decree in the above matter. We endorse the comments submitted to you by Columbia Pictures Industries, Inc., et al. in the above matter. We also join in Mr. Liman's request for a meeting with you and with the Assistant Attorney General in charge of the Antitrust Division before the Department of Justice reaches a final decision as to whether it will withdraw its consent to the proposed decree.

We enclose additional comments on behalf of United Artists Corporation and Metro-Goldwyn-Mayer Inc., which we believe further support the necessity for a withdrawal of the Government's consent to the proposed decree.

Thank you for your consideration.

Sincerely yours,

Robert R. Salman

Received on 3-1-77 at 5:20 PM
RRS/amd
Encl.

60-211-62

COMMENTS WITH RESPECT TO PROPOSED FINAL JUDGMENT IN UNITED STATES OF AMERICA v. NATIONAL BROADCASTING COMPANY, INC., CIVIL NO. 74-3601-RJK, U.S.D.C., C.D. Cal.

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COMMENTS OF UNITED ARTISTS CORPORATION AND METRO-GOLDWYN-MAYER INC. WITH RESPECT TO PROPOSED FINAL JUDGMENT IN UNITED STATES OF AMERICA V. NATIONAL BROADCASTING COMPANY, INC., CIVIL NO. 74-3601-RJK, U.S.D.C., C.D. Cal.

These comments are submitted to the Department of Justice pursuant to the provisions of Sections 2(b) - (h) of the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §16(b) - (h), by United Artists Corporation ("United Artists") and Metro-Goldwyn-Mayer Inc. ("MGM"). United Artists is a distributor of theatrical feature films.* MGM is a producer and distributor of theatrical feature films. Both companies distribute theatrical feature films for television exhibition.

The Proposed Decree Contains No Restrictions On NBC's Production Of Theatrical Feature Films

The proposed consent decree contains no restrictions on NBC's power to produce theatrical feature films. The Competitive Impact Statement confirms that NBC uses its control over access to its network "to control the prices paid by NBC for television exhibition rights to motion picture feature

* Motion pictures which are initially exhibited in theatres and only subsequently exhibited on television.

films; and to obtain competitive advantages over other producers and distributors of ... motion picture feature films."* Despite the government's recognition of the problem, the proposed decree does nothing to prevent NBC from producing theatrical feature films whenever it chooses.

The decree's "hours limitation" permits almost unlimited production by NBC of theatrical features. For instance, since the proposed decree permits NBC to exhibit a full 2 1/2 hours of NBC produced entertainment programming in prime time each week, NBC could theoretically produce 52 feature films each year and, subsequent to their theatrical exhibition, play them off one week at a time in prime time on the network.

The motion picture industry depends greatly on revenues from television exhibition of theatrical features. The fact that there are only three buyers for the first run television exhibition of theatrical feature films -- the three networks -- gives the networks unfair leverage in purchasing. The Department of Justice has recognized that such network power becomes patently anticompetitive when "... the network, through its production of entertainment programs, is in competition with outside suppliers for exhibition on its own network and that [the network] could, at any time, by unilateral decision, pre-empt all the available time on its network."*

The government, having made this accurate observation, should not now be willing to settle for a decree which gives NBC the unrestricted power to make theatrical feature films. Under the decree, NBC could fill one entire evening of prime time per week with an NBC theatrical feature film. Since the number of theatrical features shown on television has decreased, this one motion picture per week could effectively pre-empt independent producers of motion pictures from having their product shown in prime time on the NBC network.

In addition, unless its ability to make theatrical feature films is restricted, NBC will continue to use the threat of internal production to keep the prices it pays outside suppliers at an artificially low level. When ABC

* Competitive Impact Statement, p. 2.

* Page 8 of Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims filed January 19, 1976 in United States v. National Broadcasting Company, Inc., 74-3601-RJK, U.S.D.C., C.D., Cal.

and CBS entered into the production of theatrical feature films in the late 1960's, all three networks were able to suppress the price they paid other producers and distributors of motion pictures. Further, the leverage of "if you won't take our price, we'll produce it ourselves" allowed the networks to maintain the price at a level wholly unrelated to soaring costs or the natural laws of a competitive marketplace. All three networks offered the almost identical low price for the exhibition of a non-network produced motion picture. This price remained the same for several years. The producers and distributors of motion pictures had no alternative if they wanted to exhibit their films on television. They were compelled to take what the networks offered.

Allowing NBC to produce its own theatrical feature films injures competition in a variety of other ways. NBC could produce low quality theatrical feature films, expecting that any losses in theatrical exhibition would be recouped by exhibition on its own network. Also, NBC could spend vast amounts of money on a film because its prime time exhibition on NBC is guaranteed. Such expenditures would artificially force up the costs of production to outside suppliers.

The failure of the proposed decree to place any restrictions on NBC's internal production of theatrical feature films demonstrates the ineffectiveness of the so-called "hours limitation" on NBC produced programming. It also reveals that the decree provides no meaningful relief with respect to "long form" programming. For this reason alone, the proposed judgment should be withdrawn.

The Provisions Of The Proposed Decree With Respect To Network Exclusivity Over Pay Cable Provide No Meaningful Relief

Section VI(E)(iii)(e) of the proposed decree provides that for 15 years, for theatrical feature films which NBC has licensed to show on the NBC network, NBC cannot acquire exclusive exhibition rights against

> "pay or subscription television, via cable or any other means, where a per-program or per-channel charge is made to the viewer, except that NBC may acquire exclusive rights to any such feature film commencing thirty (30) days prior to the first date and extending until the last date on which NBC may broadcast such feature film under the contract between NBC and such supplier, so long as this period of exclusivity between the first and last dates on which NBC may broadcast such feature film under such contract does not exceed twenty-four (24) months, and does not exceed twelve (12) additional months for each exhibition greater than two (2) to which NBC acquires the exhibition rights" (emphasis supplied).

This provision merely codifies NBC's present contract exclusivity rights, which prevent the exhibition on pay cable of theatrical feature films licensed to NBC. The government's Competitive Impact Statement recognized the injustice of this practice by noting that the action against NBC was initiated because "despite the FCC financial interest and syndication rules, NBC and the other networks continued to exact from producers such rights as ... exclusive use of [theatrical feature films] by NBC as against other communications markets."* Accordingly, NBC should not be permitted to acquire any exclusive rights with regard to pay or subscription television.

Under the proposed decree, NBC's exclusivity over pay cable may begin thirty (30) days prior to the date on which the license agreement permits NBC to broadcast the film. At the very least, any such exclusivity should be limited to begin no earlier than thirty (30) days prior to the scheduled showing of the film.

The decree gives NBC two years of exclusivity over pay cable. Any exclusive rights should terminate thirty (30) days after the film has been shown on the network.

The proposed decree would merely put the court's stamp of approval on NBC's present trade practices in connection with exclusivity over pay cable. This is a further reason for withdrawal of the proposed decree.

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* Competitive Impact Statement, p.5.

Dated: New York, New York
March 1, 1977

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN,
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March 1, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
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Room 3706
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United States v. National Broadcasting Company, Inc., Civil No. 74-3601 - RJK, U.S.D.C., C.D., Cal.

Dear Mr. Hollander:

We represent the companies identified in the comments enclosed herewith in connection with the proposed consent decree in the above action.

After you and your staff have reviewed the enclosed comments, we respectfully request the opportunity to confer with you concerning the proposed decree. In addition, we respectfully request the opportunity to confer with the Assistant Attorney General in charge of the Antitrust Division before the Department of Justice reaches a final decision as to whether it will withdraw its consent to the proposed decree.

Sincerely yours,

Arthur L. Liman

Received on 3-1-77 at 5:30 PM

Enclosure

60-211-62

United States of America v. National Broadcasting Company, Inc., Civil No. 74-3601 - RJK, U.S.D.C., C.D., Cal.

These comments are submitted to the Department of Justice pursuant to the provisions of Sections 2(b)-(h) of the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16(b)-(h), by the following parties:

(a) Columbia Pictures Industries, Inc.

(b) Goodson-Todman Productions

(c) Paramount Pictures Corporation

(d) Twentieth Century-Fox Film Corporation

(e) Warner Bros. Inc.

(f) Universal City Studios, Inc.

The foregoing parties constitute a substantial segment of the major creative forces in the television industry today.

For obvious reasons, the outcome of this Government antitrust action against NBC as well as the outcome of the Government's companion suits against CBS and ABC will have a profound impact on the commenting parties. For, unless the Government is able to obtain meaningful relief by consent decree or otherwise, the commenting parties will continue to be, as they have been in the past, among the principal victims of ongoing network antitrust violations which are a direct result of the networks' oligopolistic dominance of access to the nation's airwaves.

Preliminary Statement

Because we firmly believe that the proposed consent decree between the Government and NBC provides no meaningful relief against network antitrust violations -- indeed, because we believe that the proposed decree will solidify, legitimize and perpetuate the networks' dominance and illegal practices -- we respectfully urge the Department of Justice to withdraw its consent to the proposed decree, as it has an unqualified right to do. If the Department is unwilling to do so, then we shall be required to urge the Court to disapprove the decree as being contrary to "the public interest," 15 U.S.C. § 16(e).

In offering these comments, we are mindful that in judging the impact of the provisions of the proposed decree, they are not to be compared to provisions which might appear in a confession of judgment by NBC.

Nor do we mean to cast any doubt on the good faith of the Government negotiators in attempting to arrive at reasonable solutions to what one distinguished Federal appellate judge, the Honorable Edward Lumbard, has described as the

> "unique and unsettled questions regarding how the antitrust laws are to be applied to the government-licensed, limited-frequency, entry-proof market of television in which the three networks have a virtual monopoly on the type and quality of programs and ideas that are disseminated to the public by television."*

And if the proposed decree provided meaningful relief, we would surely applaud NBC and be in total agreement with the statement of NBC's President, on announcement of the proposed decree that

> "By taking the lead in entering into this new charter, NBC continues its efforts to advance constructive relationships in the industry to the benefit of our program suppliers, the NBC Television Network and most importantly, the viewing public."

But:

(a) when The New York Times, in analyzing the proposed decree, writes:

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* Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc., 501 F.2d 894, 900 (2d Cir. 1974).

"... The prohibitions detailed in the agreement scarcely alter business practices and are expected to have no significant economic impact on the network itself or on the television production industry -- if and when the restrictions go into effect."*

(b) when Variety, after a similar analysis, concludes that NBC gave "Uncle Sam Its 11th Toe In Decree";**

(c) when NBC reportedly tells its affiliates not to worry -- that the settlement it negotiated merely codifies existing practices and will "cause no major changes in our way of doing business";***

(d) when, to date, no prospective beneficiary of the "purported" relief sought by the Government in the proposed decree has come forward to endorse that decree; and

(e) finally, when a major segment of the television industry represented by the parties filing these comments comes forward, as we do here, to argue that the Government, for all practical purposes, has not obtained meaningful relief against NBC;

*November 19, 1976, p. D1.

**November 24, 1976, p. 85.

***Television Digest, November 22, 1976, p. 1.

we respectfully suggest that the Department of Justice reconsider whether the proposed decree should continue to receive Government approval. And, surely the Government should reconsider the commercial reality of the assertion in its Competitive Impact Statement ("CIS") that (pp. 2-3)

"The proposed judgment provides relief similar and substantially equivalent to that requested in the complaint."

In essence, our objections to the proposed decree are as follows:

(a) A realistic analysis of the terms of the proposed decree, to wit, an analysis which takes into account not only the words of the decree but the business conditions under which it is bound to operate, demonstrates that the proposed decree alters virtually nothing -- it leaves in place, with de minimus changes, the present system of program procurement practices forced on program suppliers by all three networks, a system of practices replete with violations of the antitrust laws;

(b) But the proposed decree is even worse: by putting the Government stamp of approval on such illegal and pernicious network practices as long-term options, unreasonable exclusivity and internal production, the proposed decree is a step backwards; rather than alter the networks' past oligopolistic control of

access to the airwaves, the proposed decree blesses and sanctifies those practices and insures that the gross imbalance in power between the networks and program suppliers that has existed for many years will continue unabated; and

(c) Finally, the proposed decree represents an effort by the Government -- unprecedented since the days of the National Industry Recovery Act -- to write a standard code of anti-competitive business behavior for a major American industry. For under the express terms of Section VII of the decree, key provisions (e.g., so-called restrictions on long-term options, internal production, etc.) will not become effective until similar relief has been obtained against CBS and ABC. Hence, the Government has sanctioned the proposition that the minimal and meaningless relief obtained by the proposed decree with NBC, which preserves the networks' anti-competitive practices, should be delayed until CBS and ABC agree to abide by the same so-called restrictions. In short, when all three networks agree to a standard form of anti-competitive contract, then -- and only then -- will the key provisions of the proposed decree against NBC become effective.*

Hence, parallel business practices as practiced now and a standard contract will now receive the Government seal of approval. Producers, creative forces and others will, as in the past, have no alternative when they go to the marketplace: all three networks will -- this time with Department of Justice approval -- offer and demand virtually identical anti-competitive deals. This is not, we suggest, one of the intended purposes of the antitrust laws.

* * *

We may sum up the view of the commenting parties in this fashion: as the parties on the firing line, as the parties who must deal on a daily basis with the three networks, as the parties who are required to surrender valuable property rights to those networks merely as a condition of engaging in

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* The proposed decree goes even further in guaranteeing that there will be only one code of anti-competitive behavior for all three networks. For as the CIS points out with regard to Section IX (p. 14):

> "If a non-appealable judgment were entered dismissing either of the companion actions against CBS or ABC or decreeing injunctions different from those in this judgment, this provision [Sec. IX] would permit NBC to seek and obtain whatever relief, if any, was necessary to prevent it from being placed at a competitive disadvantage with respect to CBS or ABC. While this type of provision is unusual in an antitrust judgment, it is warranted by the unique nature of this industry, and the pendency of the companion actions." (Emphasis added)

Thus, NBC has obtained the best of all possible worlds -- a heads-I-win, tails-you-lose provision of an antitrust decree which allows it to continue to engage in parallel anti-competitive economic behavior with its competitors under any and all circumstances, so that it will not be placed at a "competitive disadvantage" with its competitors.

fn. cont'd

network program development, we find ourselves in agreement with what NBC reportedly told its affiliates -- don't worry, it will be business as usual (see p. 4, supra).

A decree which sanctions that result is contrary to the public interest; we urge the Department of Justice to withdraw its consent.

If NBC is only willing to give the Government its "11th Toe," then we respectfully urge the Government to give back that toe. The Department of Justice should reopen negotiations with NBC and seek meaningful relief or else prosecute its lawsuit against NBC with vigor and dispatch.

In this respect, we should note our total agreement with the Department of Justice position previously urged in this lawsuit and the Court's recent decision in the companion cases against CBS and ABC that the FCC does not have exclusive jurisdiction over the antitrust violations alleged in the Government's complaints.

The networks' antitrust violations are proper subjects for Federal judicial inquiry. And that inquiry should continue despite the recent FCC Notice of Inquiry, dated January 14, 1977 (Doc. No. 21049) (hereafter "FCC Notice of Inquiry").*

But the ultimate result of such a judicial inquiry should be a decree -- whether by consent or after trial on the merits -- which does restrict, in a meaningful fashion, the networks' anti-competitive conduct and their egregious violations of the antitrust laws.

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* The FCC Notice of Inquiry, with reference to the pending actions against NBC, CBS and ABC, states (p. 3):

> "We would like to make it clear that, in instituting the present inquiry, we have neither the power nor the desire to foreclose the Department [of Justice] in its antitrust action. While it is inevitable that thorough inquiry into network practices will encompass many of the questions raised in the antitrust suit, we do not believe that our inquiry should in any way preclude the Department from prosecuting its case or from arranging an appropriate settlement. See United States v. Radio Corporation of America, 358 U.S. 334 (1958)."

The Antitrust Violations

We think it important to set forth in summary fashion our views as to why the three networks violate the antitrust laws and how those violations adversely affect the business activities of the commenting parties.

This analysis is not intended to detract whatever from the other antitrust allegations which have been made by the Government either in this lawsuit or in its companion cases against CBS or ABC.

Rather, our objective here is to focus (1) on the means by which the networks have been able to become the three principal buyers of first run, original television programming; and (2) how they have illegally abused that immense power to extract from the suppliers of first run, original television programming unreasonable and illegal contractual provisions relating to such matters as long-term options at pre-set prices, exclusivity, "spin-off" rights, etc. and to eliminate meaningful price competition among themselves for programs.*

* A good part of the discussion that follows deals with what we consider to be the business realities of the television industry. The only absolute statement that can be made about those business realities is that there are no absolutes. Each of the commenting parties, at various times, with respect to particular programs and particular networks, has had varying experiences. Accordingly, it would be an overstatement for us to suggest that all producers have had exactly the same experience with all three networks as to all programs. Nevertheless, we all know that in our business there are industry-wide patterns and industry-wide anti-competitive practices generally engaged in by the networks. Our focus, therefore, will be on these industry-wide practices, with full recognition that for every rule there will be an exception.

a. The Network Combinations

We begin with what we believe to be an undisputed, but sometimes forgotten proposition: in theory, there are approximately 700 VHF local television stations which are potential purchasers of first run, original television programming.

In the real world, however, there are only three such principal buyers -- the three television networks.

This peculiar state of affairs -- the reduction of a potential market from 700 to three principal buyers -- has arisen because the networks themselves each own stations in five of the nation's largest markets and because the networks have each combined with approximately 200 affiliated stations in a fashion which effectively eliminates these stations as potential separate buyers of first run, original television programs.*

* It would be oversimplification, of course, to suggest that the three networks are the only buyers of television programming. But it is not oversimplification to suggest that at a trial on the merits it could be amply demonstrated that the three networks dominate the nation's airwaves. Each network through its owned and operated and affiliated stations reaches 98% of the homes in the country. In this context, a program supplier of first run, original programming who is unable to obtain network time for his program obviously has his work cut out for him in gaining any significant access to the nation's airwaves.

The facts which support the foregoing analysis are undisputed. To begin, the networks themselves are not broadcasters; they hold no licenses from the FCC (their five owned and operated local stations are, of course, licensed). Indeed, we are unaware of any command in federal law or any other body of law that there should be television networks.

But the next question is whether there is some economic, social or other reason for the existence of networks. In this context, the principal functions the networks do perform may be easily identified: (a) each is a common buying agent of programs for approximately 200 stations; (b) each is a common selling agent of advertising time for those same 200 stations; and (c) each provides an efficient physical mechanism for transmission of the programs purchased and the advertising messages sold to the 200 stations.

Viewed in this fashion, the networks perform in economic terms what may be best described as a clearinghouse function. The networks are the "clearinghouses" which permit the producers of first run, original television programs to deal with the numerous buyers of their programs (the local television stations), without requiring the expense and inefficiency of individual bargaining. And the networks perform the same function for the advertisers and the local stations. Finally, the networks provide the technical facilities for transmission of programs and advertising messages to local stations as part of a common schedule.*

So that our views on this subject are not misunderstood, we see no evil in networks performing these various clearinghouse and technical functions. And we are surely not opposed to an industry structure in which networks exist.

But when this analysis of the network function is taken one step further, it does become meaningful in antitrust terms: a full development of the facts in this case would demonstrate that as to the 200 stations in each network line-up, each network, in reality, is virtually the exclusive buying agent of programs and virtually the exclusive selling agent of advertising time for the vast majority of programs transmitted by the networks.**

The foundation for this state of affairs is, first, the networks' control over their five owned and operated stations

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* There has been a great deal of recent discussion in the trade press and elsewhere about a "fourth network." Much of this discussion and some of the programming efforts in this area are, in reality, a reflection of the frustration of producers of first run, original programming in dealing with the three established networks and an attempt, out of desperation, to find a "fourth opportunity" for their creative efforts. In any event, efforts at establishing a "fourth network" are all in an embryonic stage and there is substantial controversy over whether any such efforts will succeed.

** According to statistics set forth in a petition recently filed by Westinghouse Broadcasting Company, Inc. with the FCC (p. 15), "the networks now program roughly two-thirds of all available time on all affiliated stations (530 out of 798 half hour units)."

in the nation's largest markets and, second, the arrangements between the networks and their affiliated stations -- these are the factors which hold together the three combinations of approximately 200 stations and permit the networks to exercise their vast economic power.* Legally, the affiliation agreement may give the affiliate a retained right to refuse to "clear" a network-offered program; but a full development of the facts at a trial of this action would demonstrate that the affiliates rarely exercise this retained right and rarely refuse to "clear" network programs.*

For present purposes, we need not concern ourselves with the reasons why local stations rarely refuse to "clear" network programs. Whatever the reasons, the undisputed fact is that the rate of clearance by local stations is extremely high; in prime-time, it is almost always 99%.**

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* The FCC Notice of Inquiry, in rather precise terms, has spelled out the reach of the networks' power, by virtue of their owned and operated stations and their affiliation arrangements, as follows (p. 5):

> "Ever since the demise of the Dumont Network in the mid-1950's, there have been only three 'national' television networks: the American Broadcasting Companies, Inc. (ABC), Columbia Broadcasting System, Inc. (CBS) and National Broadcasting Company, Inc. (NBC). Recent years have witnessed the development of a number of specialized networks offering sports or movies, but the pre-eminent position of the three national networks remains unchallenged. Their affiliates number well over 75% of all U.S. commercial television stations (approximately 600 out of slightly more than 700) and, outside the major markets, network affiliation is virtually indispensable to successful station operations. [Footnote omitted] As discussed below, it appears that about sixty percent of the broadcast programs currently presented by affiliates are supplied directly by their network. In addition to their ability to reach nearly all American households through their affiliated stations, all three networks own VHF stations in each of the nation's three largest television markets (New York, Los Angeles and Chicago), and two in other major markets (ABC, Detroit and San Francisco, the 6th and 7th markets; CBS, Philadelphia and St. Louis, the 4th and 12th markets; and NBC, Cleveland and Washington, the 8th and 9th markets). Each of these 5-station 'owned and operated' (O and O) groups reaches about 22 percent of the U.S. audience. [Footnote omitted] The networks are actively involved as brokers or middlemen connecting the program producers and national advertisers with local stations and their viewers. It is, therefore, not surprising that the networks play a very important role in the development, selection, and distribution of television programming."

* The Government itself recognized that the question of refusals to "clear" network programs by local stations was significant to its theory of the case. In its "Supplemental Statement of Genuine Issues" (p. 6), it identified as an issue to be tried:

> "Whether each network has denied independent access by outside program suppliers to its combined affiliates by <u>insisting on a high rate of network clearance</u>." (Emphasis added.)

The subject of local station "clearance" of network-offered programs is now also the subject of the FCC Notice of Inquiry.

** At this stage, we need not be concerned with precise numbers. If a program supplier is precluded by means of the network combinations with the local stations from dealing even with 75% of those stations for broadcast time for two-thirds of the broadcast day, the impact of the restraint is clearly substantial.

The CIS acknowledges (pp. 3-4):

> "NBC, through its affiliated television stations, has control over access to approximately 98% of all

fn. cont'd

The net effect of this industry structure from the viewpoint of the program supplier is, we suggest, also undisputed. Because there are three separate network combinations each involving some 200 stations, because the affiliates clear almost all programs offered to them by the networks, the program suppliers of first run, original programs have only three principal buyers for their product -- the three networks.

A market which would otherwise have many sellers and many buyers has been transformed into a market with only three buyers.

The issue here, of course, is not whether networks are good or bad, either in a moral or economic sense. We are not anti-network per se. As "intermediaries" or "clearinghouses" the networks perform some useful functions. But the fact is that the networks are combinations which effectively restrain trade and the competition for first run, original television programming that otherwise would exist among the local stations which are now network owned and operated or are network affiliates.

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footnote cont'd

United States television households for programs which it offers for broadcast. This is because during prime evening hours, when television viewing is at its peak, most of the 200 NBC affiliated stations and all the NBC owned and operated stations depend upon NBC for virtually all of their television entertainment programming. In early 1976, for example, NBC's primary affiliates and its owned and operated stations broadcast over 90% of the programs regularly offered by the NBC Television Network during prime evening hours." (Emphasis added; footnotes omitted)

Accordingly, Section 1 of the Sherman Act does apply to the networks' program procurement practices and does require that those practices be judged by the "rule of reason."

b. Network Procurement Practices

The three networks -- have obtained their vast economic power to control access to the nation's airwaves by ownership of five owned and operated local stations and by combinations with affiliated local stations -- have abused that power, in violation of the rule of reason of Section 1 of the Sherman Act.

They have done so by means of the contractual provisions the networks extract from program suppliers, which create and maintain anti-competitive conditions in the television industry.

The Department of Justice is fully aware of the industry-wide practices by which the three networks generally exercise virtually total domination over outside program suppliers from the very first day that the relationship between a program supplier and a network, with respect to a particular program, comes into existence. For example, if the producer comes to a network with nothing more than a concept for a series, at that earliest stage, even before there can be any meaningful development of the concept, the producer is generally required to surrender virtually complete artistic control over his creative efforts to the network. The producer must give the networks what

amount to veto rights with regard to program content and the use of talent -- rights which the networks are not hesitant to exercise and may be totally at odds with the producer's own creative concepts concerning his series.* The producer must give the networks the right to determine the extent to which, and the timing of, development -- when the script will be commissioned, when the pilot will be filmed, when the series will go on the air, etc. All aspects of scheduling are within the networks' control; the supplier has no control over the competition against which he must be judged. Promotion of the program on the network -- in the pilot stage or even after the first epi~~sodes of a~~ series have been ordered or telecast -- are within the networks' control. At any time, for rational or irrational reasons, the networks have a unilateral right to opt out -- to refuse to go to the pilot stage, to cancel a series at any time even if it meets otherwise objective standards for continued exhibition on the network.

Although a complete catalog of network abuses would unduly lengthen these comments, some description of the most serious of the network abuses is necessary, if for no other reason than as the means by which to measure the extent to which the proposed consent decree deals with these abuses. That description follows:

* * *

* The proposed decree leaves untouched the entire subject of creative controls. NBC may continue -- as in the past -- to exact from program suppliers the same onerous provisions with regard to "approval of creative elements and program content" (Sec. IV). The failure of the Government to obtain any relief in this area is another aspect of the proposed decree we find unacceptable.

We noted before that today, for the program supplier of first run, original television programming there is one unalterable fact of life: he has only three principal buyers for his original television programming, the three national television networks.

It is perhaps of greater interest that at any trial of this action the facts would show that, on a general industry-wide basis, whichever of the three networks the producer may determine to deal with, he will be offered virtually identical terms from each of the networks. And if he desires to sell his program, he will have no choice but to accept those terms. See, e.g., Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939); Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974), cert. denied, 419 U.S. 999 (1975).

And, finally, he will find that those parallel terms are designed to insure that the networks -- but not the producer -- will be able to reap enormous profits if the program is successful.* American Tobacco Company v. United States, 328 U.S. 781 (1946).

* As to network profits, the FCC Notice of Inquiry points out (p. 7):

> "Network control over access to the medium has also coincided with rather extraordinary increases in profits. Between 1960 and 1975, total combined network expenditures rose from $461 million to $1,465 million, for an average annual increase of 13.6 percent. Total net

1. Options

For example, as the Government well knows, it is the general pattern in the industry today that when the networks order a script for a possible "pilot" program of a possible new prime-time series, the networks will demand outside producers, among other things (see pp. 17-18, supra), to surrender long-term options on the still unborn series for what amounts, in most instances, to its entire potential useful life for prime-time exhibition at pre-set prices.

The typical option term today is five years** -- in most instances, its entire potential useful life for prime-time exhibition. The networks -- all three marching in lock-step -- will not deal in any other way. The producers must usually surrender five years of options. (If the proposed series is for non-prime time exhibition, the option period may be as long as 9 or 10 years.) On this score, the networks, by their parallel conduct, guarantee that none of them will be placed at a "competitive disadvantage."

Moreover, the price for all five years of the option period will be fixed at this early stage when it is not possible to know whether the program will be a success or a failure or what the program will cost to produce. And the price for each succeeding year in the option period will not vary contractually depending upon the success (or failure) of the program.*

fn. cont'd

broadcast revenues, on the other hand, increased more rapidly; from $495 million in 1960 to $1,673 million in 1975, which was equivalent to an average annual increase of 15 percent. Net income (total combined profits before taxes) earned by the networks has risen at an annual rate of 32 percent; increasing from $33.6 million in 1960 to $208 million in 1975. According to the Internal Revenue Service, pre-tax profits accruing to all businesses in the United States increased at an average annual rate of approximately 12 percent between 1960 and 1974." (Emphasis added)

** To be precise, the network, when it orders a "pilot," obtains the option to order episodes for the first year of telecast and then obtains options to order episodes for the succeeding four years -- hence, at the "pilot" stage of development, the producer becomes obligated, at the network's option, to produce the program for five broadcast seasons at prices set at the "pilot" stage of development.

Very few series ever get to the point where the producer is freed of his five-year contractual obligation to the network to produce episodes at pre-set prices. According to our research, between the 1966-67 television season and the 1972-73 season, 186 new series were shown on the networks; of that number, only 15 were still on the air after five years.

* The typical contract will provide for some minimal escalation of the series price in each succeeding option year (usually less than 5%) and will also provide for escalation of price on account of such matters as increases in union wages. And there have been instances when a network has granted "relief" by raising a series price so as to provide additional compensation for a recalcitrant leading actor or actress or because production costs have far exceeded original estimates or for some other reason. In these instances, however, the producer has gone to the network as a supplicant -- not because he has any contractual right to seek an increase in the series price. And if he is granted "relief," typically he will be required to do something for the network, to wit, agree to extend the option years to six, or seven, or beyond.

Next, the price being offered by each of the networks very often does not cover his production costs. It may, sometimes, yield him some small profit, but in most instances, the producer is forced to operate at a deficit. In those instances, during the prime time run of his program, his license fee from the network will not cover his production costs. And, unless the producer is lucky enough to have one of the few programs whose prime time run is sufficiently long to provide him with the possibility of obtaining additional revenues in the highly competitive syndication market, there will be no way for the producer to recoup his deficit.

And, finally, the program producer in his dealings with all three networks is likely to discover this fact: Each network (within limited ranges and with exceptions for some special situations) will be paying the same pre-set pilot and series prices for comparable types of programs (X dollars for a 1/2 hour comedy produced on tape, Y dollars for a 1 hour detective drama produced on film, Z dollars for a 1 hour western produced on film, etc.).* As a general proposition, it is fair to say that there is no price competition among the networks.

Since there are only three principal buyers, since the program supplier today has virtually nowhere else to go with his program concept, since all three buyers are offering him virtually identical terms and will not deal on any other basis, the outcome of these "negotiations" in almost every instance is a foregone conclusion -- that is, if the producer desires to remain in business.

But the net effect of these parallel program procurement practices by all three networks is also, we suggest, obvious -- the networks have successfully eliminated the possibility of any price competition among themselves for television programming. See Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974).

Once the ink is dry on the contract or the deal memorandum for a particular program, no network need fear that for the five-year option period, it will be required to compete in price terms against any other network for that program. To use the expression most commonly used by the networks in defense of their parallel practices, no network will be at a "competitive disadvantage" vis-a-vis its program suppliers. To use the words of the real world, however, no network will be required to engage

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* Whatever the justification, if there be any, for parallel pricing at a time when neither the producer nor the network knows how well the program will be received by the public, when the program goes on the air and its success or failure is determinable, there is a different reality. At that stage there is no reason why price should not vary with success -- and it could, but for the fact that the network has already forced the producer to grant long-term options at pre-set prices.

in price competition against any of the other two networks for programs.*

And to make things even better for the networks, although they have no contractual obligation to increase the pre-set price to the program supplier, if the program becomes a success there are no contractual limits on the amounts they can charge advertisers for the insertion of commercial messages in the successful programs. The networks are always free to raise the advertising rates for their programs with high ratings; but the program supplier never has the contractual right to receive any portion of these increased rates. Because of long-term options at pre-set prices, it is always the networks -- not the producers -- which receive the profits available from being able to charge high advertising rates for a successful program.**

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* The networks are fond of boasting of the highly competitive activities they engage in to obtain viewers for their programs. We do not doubt the vigor of their efforts in that area. But competition for viewers is no substitute under the antitrust laws for the absence of price competition among the networks vis-a-vis their program suppliers.

** The CIS states (p. 3):

> "The value of any television program to its producer and to an advertiser whose message is broadcast in conjunction with it, depends in large part on the number of television viewers who see the program and observe the commercial messages."

We agree. But, because of long-term options, the price paid by a network to a producer for a television program has nothing to do with the number of television viewers who see the program.

2. Exclusivity

If parallel long-term options at pre-set prices eliminate the possibility that the producer will be able to share in network profits from a successful program, the parallel provisions demanded by the networks with regard to exclusivity as to other television uses go a step further in aggravating the producer's plight. Thus, it is an industry-wide pattern that for the entire length of the option period, the producer's price for prime time exhibition on the network will remain essentially the same (perhaps it will be a price which equals his production costs) -- but for the entire length of the option period, he will not be able to realize revenues from older episodes of the series already broadcast because the networks will force him to surrender for the entire option period the right to license older episodes of the series for other television uses (e.g., stripping during the daytime or early evening or the showing of individual episodes during early evening hours, fringe time, etc.) by other networks or by local stations, be they affiliates or independents.

Because of these exclusivity provisions, the older episodes of a series must simply sit on the shelf, gathering dust, and the producer is generally precluded from obtaining whatever value may be left in the older episodes until the option period has expired.

There might be some justification for this state of affairs if it could be demonstrated that the networks require exclusivity as to old episodes against all other television uses in other day-parts to preserve or maintain the ratings of new episodes in prime time (although it is a good question why a producer should be forced to give the networks this supposed protection at the very same time that he is forced to surrender any possibility of sharing in the profits from high ratings in prime-time).

But the facts offer little, if any, support for that justification for unreasonable exclusivity demanded by the networks against other television uses. There are just too many instances in which old episodes of a series still being telecast in prime time have been telecast in other day parts without any measurable or adverse impact on prime time ratings of new episodes of that series. Appendix A is a table which shows the instances in which old episodes of a series have been telecast in other day parts during the prime time exhibition of new episodes of the series.

It is significant that most of the examples given in Appendix A relate to instances in which a network which has obtained the broad exclusivity we noted above has determined to allow non-prime-time stripping or other non-prime-time uses of older episodes of a prime-time series on its own network.

The fact that a television network is willing to allow this invasion of its exclusivity rights for the benefit of its own network strongly suggests that the networks demand and obtain exclusivity against other television uses not for the presumably legitimate purpose of protecting prime-time ratings, but for entirely different purposes -- (a) they preserve for themselves the option to use older episodes on their own networks in non-prime-time, (b) they prevent the possibility of a bidding war among themselves, or with local stations, for non-prime-time uses of the older episodes of a successful prime-time series, and (c) they protect their owned and operated stations from the competition that might result if independent stations in the markets in which the owned and operated stations broadcast could show old episodes of prime-time programs during the early evening hours when the owned and operated stations have their local news programs on the air.

In short, the broad exclusivity provisions which the networks now routinely demand and obtain from program suppliers are not designed to protect legitimate network interests in preventing the dilution of prime-time ratings. Instead, like long-term options, they are designed to prevent price competition among networks or among networks and local stations and competition among network owned and operated stations and independent stations. Here, as in other instances, no network

places itself at a "competitive disadvantage." And, here, as in other instances, what the phrase really means is that the networks, by engaging in parallel practices, preclude the possibility of price competition among themselves, all to the detriment of the program supplier. United States v. Griffith 334 U.S. 100 (1948); Twin City Sportservice, Inc. v. Charles O. Finley & Company, Inc., 512 F.2d 1264, 1274, 1275 (9th Cir. 1975).

3. Internal Production

In addition to the economic leverage inherent in a marketplace where there are only three principal buyers and many sellers, the networks further bolster their power to deal with program suppliers on terms most favorable to the networks by engaging in internal production of entertainment programs.

Internal production, to any extent, preempts the limited network time available for programs produced by outside suppliers. And what better way is there for a network to deal with a recalcitrant independent program supplier than to suggest that the network need not deal with him at all, but can simply use its own internally-produced program.

In short, internal network production of entertainment programs -- indeed, the mere threat of internal production in a marketplace of scarce prime time dominated by three networks -- is an unfair competitive practice and an unreasonable exercise of network power. Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973); United States v. United Shop Machinery Corp., 110 F. Supp. 295, 338-346 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954); United States v. Aluminum Company of America, 148 F.2d 416, 430-431 (2d Cir. 1945). It is no surprise, therefore, that all of the networks produce some of their own prime-time and non-prime-time entertainment programming. Internal production is an ever present gun pointed at the heads of independent program suppliers -- and the threat is no less real because there may be only one bullet in the chamber of the gun.

In connection with internal production, the networks engage in another practice which is equally unreasonable and anti-competitive. They restrict the pool of talent -- actors, actresses, writers, directors, producers, etc. -- available to independent program suppliers by engaging that talent on an exclusive basis for the contracting network. In many instances, the network is able to contract for that talent on an exclusive basis by offering something no independent program supplier could possibly offer -- guaranteed network air time.

There is no justification for a network to be permitted to engage in this kind of unfair competition with independent program suppliers.

The networks should not be in the business of producing programs for exhibition on their own networks. Surely, given their dominance of access to the nation's airwaves, they should not be in the business of acquiring talent on an exclusive basis, in competition with independent program suppliers, whatever the reasons for acquiring such talent -- be it for the purpose of using such talent on internally-produced programs or for the purpose of "laying off" the talent to independent program suppliers, whether or not the independent program supplier has any need or desire for that talent.

* * *

Long-term options, exclusivity and internal production are, as we noted before, merely examples of the type of anti-competitive practices engaged in by the networks. We could add to the list such matters as the typical contract provisions which grant the networks unreasonable "spin-off" rights, unreasonable exclusivity against other media, unfair and unreasonable "creative controls," etc.

The simple facts, however, are these: the networks are combinations, which by virtue of their affiliation agreements and the economic and other pressures which they can bring to bear on affiliates to "clear" network programs, have preempted a large proportion of the most desirable broadcast time available on the nation's airwaves. In so doing, they have, for all practical purposes in most instances, eliminated the competition which might otherwise exist between hundreds of local television stations for first run, original television programming. Having thus constituted themselves as the three principal buyers of original television programming, they have abused that power by extracting unreasonable and onerous conditions from program suppliers by vertical contracts which restrain trade. They have successfully eliminated meaningful price competition among themselves as to program suppliers. They have sought to achieve -- and they have achieved -- virtually total domination of the activities of the creative community and the producers of programs in the television industry.

The anti-competitive conditions in the television industry -- the gross imbalance in power between the networks and program suppliers -- has long been recognized by all interested government agencies and by all expert groups.

Against this background, we turn to an analysis of the provisions of the proposed decree and the CIS.

The Proposed Decree

In our view the heart of the proposed decree lies in the provisions relating to long-term options (Sec. VI(E)(i)), exclusivity against other television uses (Sec. VI(E)(ii)) and internal production (Sec. V). These are the major areas of network abuse.*

Accordingly, a determination of whether the proposed decree is in the public interest rests, we submit, on an analysis of whether the Government has obtained meaningful relief in those major areas of abuse.

We respectfully submit that the Government has not.

1. Options (Sec. VI(E)(i)). As we sought to demonstrate earlier, one of the keys to network power over program suppliers and the networks' ability to eliminate price competition among themselves are the identical provisions the networks extract from suppliers with regard to long-term options.

Sec. VI(E)(i) of the proposed decree which deals with options is, in consequence, one of the key provisions of the decree.

* In the interests of brevity, we shall not discuss provisions of the proposed decree which deal with peripheral or tangential problems.

The Government, we think, would agree. The CIS says (pp. 17-18):

> "Section VI(E)(i) was the subject of intense negotiation between the parties. Although not specifically requested in the complaint, an important element of the proposed relief is the initial limitation to four, of the yearly options obtainable by NBC when it contracts for production and possible exhibition of a new program series. The Government initially proposed a two year limit on the option period, and various compromises were considered, including a proposal for basing program license fees upon program popularity, which was discarded as unworkable and inappropriate."* (Emphasis added)

This portion of the CIS, however, concludes, as follows (p. 18):

> "The Government believes that the relief provided would be substantial."

We must respectfully disagree. In our judgment, the relief provided is not "substantial."

Section VI(E)(i), in full text, provides, as follows:

> "NBC is enjoined and restrained:
>
> * * *
>
> "(E) For a period of fifteen (15) years from the effective date of this Section, from:

* The CIS unfortunately is silent on the nature of the "various compromises [which] were considered"; nor does it supply any further information as to why the Government retreated from its initial proposal of a "two year limit on the option period."

"(i) Acquiring from an independent program supplier options for Network Exhibition of a prime time network entertainment program series exercisable for a period in excess of four (4) years from the date of first broadcast of an episode of such program as part of an NBC prime time television network entertainment program series, and the balance of any broadcast year in which such four (4) year period ends, provided that nothing herein shall prevent NBC, after the date of first broadcast, from negotiating new provisions which may include the purchase of an extension of the option period to five (5) years from the date of first broadcast, and the balance of any broadcast year in which such five (5) year period ends, and, at the end or during the final year of any contract term, from negotiating for and entering into new agreements with said supplier so long as the options acquired under any such new agreements do not exceed a period of four (4) years from the date of first broadcast of an episode under such new agreements, and the balance of any broadcast year in which such four (4) year period ends, plus the right to negotiate for and acquire a fifth option year, and provided further that nothing herein shall prevent NBC from acquiring first negotiation and first refusal rights for new agreements with said supplier so long as any such first refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms, and provided further that nothing herein shall prevent NBC from entering into contractual provisions incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment."

Hence, Section VI(E)(i) deals with three separate, but closely related areas: 1) the option term in the original contract (four years); 2) the right to a renegotiation to obtain a fifth year of options (permissible after the date of first broadcast); and 3) first negotiation and first refusal rights during the final year of the contract for further exhibition rights.

First, while the Government asserts that the relief is "substantial," we seriously doubt that anyone in the business of producing television programs would -- and certainly the commenting parties do not -- regard a reduction of the option term from five years to four years (even if that reduction were absolute, which it is not) as "substantial" relief.*

It is perhaps more important, however, that Section VI(E)(i) represents Government blessing for long-term options as a permissible program procurement practice by a network, in the face of the demonstrable anti-competitive impact of long-term options (see pp. 20-24, supra).

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* In commenting on this provision, the CIS states (p.11):

> "This provision is designed to restrict NBC's present ability to obtain exclusive rights to a program series for as long as seven years on terms and conditions set before the program has ever been developed."

If the reference to seven years is meant to suggest that the impact of the reduction of option years to four should be judged against a current industry-wide standard of seven years, then the reference is based on a factual misunderstanding. The typical option period today, as we noted before, is five years.

A reduction of the option term from five years to four hardly remedies the anti-competitive conditions flowing from long-term options and hardly provides a competitive marketplace for a successful program. For four years, the program supplier is still suffering from his inability to obtain competitive bidding by the three networks for his successful program. For four years, he is still receiving pre-set prices for his programs which do not reflect the success of his creative efforts. For four years, the networks are still free to reap all the profits from a successful program, without any contractual obligation to reward the producer for his successful efforts.

In these circumstances, a proposed decree which does nothing more than reduce from five years to four the length of time during which all these anti-competitive conditions are allowed to prevail does not, in our judgment, provide "substantial" relief.

Next, in many or at least in some cases, the four year term may prove to be illusory because of NBC's right to negotiate for a fifth year of options after first broadcast. We are unaware of any pro-competitive goal to be served by such a provision and the CIS is silent on that subject. We are unable to perceive any useful purpose to be served by providing an all-powerful network with the opportunity to use its leverage against a program supplier to obtain a fifth year of options after first broadcast, even if some producers will be able to resist that leverage. It is not "substantial" relief to provide the networks with that opportunity.

Finally, the provisions of the proposed decree relating to first negotiation, first refusal rights during the last year of the contract do not provide "substantial" relief.*

For one thing, those provisions will not become relevant until a series has already been on a network for four or five years -- a period of time which is eternity for most television series. Those provisions offer no relief to the program supplier for those first four or five years.

Next, most program suppliers will think twice before moving a program from a network where it has been successful and may have a favorable spot in the network schedule to another network where its future may become less certain.

Finally, the first negotiation, first refusal provisions are based on an unspoken premise which may turn out to

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* We recognize, of course, that the first negotiation, first refusal rights as set forth in the proposed decree are an improvement over the first negotiation, first refusal rights the networks today extract from program suppliers.

be a fiction -- that the networks which go to such lengths by parallel practices to avoid price competition for programs will be willing to engage in such competition for new episodes of a four- or five-year old series. Moreover, the very presence of any preferential rights is detrimental to the operation of a free marketplace.

On the subject of options, we must also note that there is nothing in the proposed decree which places any limitation on NBC's ability to extract long-term options (sometimes as long as 9 or 10 years) from suppliers of non-prime-time programming. There is nothing in the CIS which deals with that subject at all. In our judgment, the abuse of extracting long-term options is just as serious for suppliers of non-prime-time programming as it is for suppliers of prime-time programming and it should be dealt with in any proposed decree.

Before we leave the subject of options, we think it important to point out a fallacy which appears in the CIS with regard to the provisions of the proposed decree relating to options. Talking about Section VI(E) generally, the CIS states (p. 10):

> "For a period of fifteen years, the proposed judgment would place the following outer limits on the exclusive rights that NBC may acquire from an independent program supplier in obtaining network exhibition rights for a prime time entertainment program (the supplier can, of course, grant NBC fewer and lesser rights from these). . . ."

The fallacy is simple enough: the networks have the power to go to the outer limits. Indeed, we thought the Government's lawsuits were based on the theory that outside suppliers could not resist network leverage to go to the outer limits. As to options, the supplier, as a matter of business reality, cannot refuse to grant NBC fewer and lesser rights than those set forth in the proposed decree as to options -- not if he wants to get to the point where he has the opportunity to have his program broadcast. Producers have not been able to engage in meaningful negotiations with networks on the subject of options.

We are unaware of any provision in the proposed decree which would alter that result. The Government's stated "anticipat[ion] that because of the proposed judgment, the forces of competition would be able to operate more freely on NBC's program procurement practices" (CIS, p. 7) is, in our view, unfounded speculation about the business conditions under which the proposed decree is bound to operate.

2. Exclusivity (Sec. VI(E)(ii)). With respect to the provision of the proposed decree relating to exclusivity against other television uses, the CIS states (p. 11):

> "This provision should free a substantial number of entertainment program series for syndication and

other uses much earlier than is currently possible."

We are required to disagree.

Sec. VI(E)(ii) provides:

"NBC is enjoined and restrained:

* * * * * *

(E) For a period of fifteen (15) years from the effective date of this Section, from:

* * * * * *

"(ii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for prime time network entertainment program series episodes for which NBC has exercised a contractual right to Network Exhibition, in excess of the following:

"(a) for prime time use, the duration of any contract term or terms by which NBC acquires the right to Network Exhibition;

"(b) for non-prime time stripping on television broadcast stations, four (4) years from the first prime time episode broadcast; and

"(c) for all other broadcast uses, three (3) years from the first prime time episode broadcast, provided that nothing herein shall prevent NBC from negotiating for and acquiring rights, including exclusive rights, for stripping and once weekly exhibition to be utilized after the periods of exclusivity set forth above, so long as negotiation for and acquisition of such rights takes place after NBC has agreed to order episodes of such program for the first year of broadcast as an NBC prime time television network entertainment program series, and provided further that nothing herein shall prevent NBC from acquiring exclusive exhibition rights to series episodes for the broadcast year for which such episodes are ordered."

Section VI(E)(ii) thus deals with three separate situations concerning a network's exclusivity over older episodes of a series being shown in prime time on the network:

a) other prime time uses (total exclusivity for the network);

b) non-prime time stripping (four years of exclusivity for the network); and

c) all other broadcast uses (three years of exclusivity for the network).

First, as to other prime time uses, the proposed decree offers no relief at all. "Prime Time Hours" is defined in the proposed decree as meaning 6 P.M. to 11 P.M. in the Eastern and Pacific Time Zones and 5 P.M. to 10 P.M. in the Central and Mountain Time Zones. Hence, under the proposed

decree, a program supplier would be totally precluded -- as he is today -- from licensing-older episodes for broadcast by independent stations in the early evening hours. This important part of the syndication market would be completely cut-off. And the network would still be able to protect its owned and operated stations from the competition that might result if independent stations in those markets were able to show old episodes of prime time series while the owned and operated stations had their news programs on the air in the early evening hours.

Second, as to non-prime time uses; the periods of network exclusivity are either meaningless or are far too long. For example, as to non-prime time stripping, a producer must usually have four years of negatives before stripping is a likely possibility. And under the proposed decree, four years of options are permitted. Hence, for all practical purposes, the network will obtain the same rights against prime-time stripping it obtains today -- exclusivity for the option period, except that the period may be reduced from five years to four years and non-prime time stripping may be able to commence one year earlier than is presently possible. This is not meaningful relief.

As to all other broadcast uses, in the absence of any hard proof that prime time ratings of new episodes are adversely affected by showings of older episodes in non-prime time hours, there is no justification for precluding a program supplier for three years from making whatever deals he can for non-prime time showings of older episodes.

There is no reason why a producer should not be able to provide a continuous stream of older episodes of a prime time series to the syndication market for non-prime time use, say after the first year of broadcast in prime time.

It is unreasonable, we suggest, for a television network to deprive a producer of this source of revenue for the extended period of time allowed by the decree, while at the same time depriving him of any profits from prime-time exhibition by virtue of long-term options at pre-set prices.

Finally, as with options, the provisions as to exclusivity against other television uses may prove to be illusory because of the opportunity granted by the proposed decree to NBC to acquire greater exclusivity rights so long as the acquisition takes place "after NBC has agreed to order episodes of such program for the first year of broadcast." As with options, we are unaware of any pro-competitive goal to be served by such a provision and again the CIS is silent on that subject. The network should not have the opportunity to negate the provisions of the decree by using its leverage in an effort to compel program suppliers to grant it greater exclusivity

rights, even if the use of that leverage may not succeed in all cases.

We are troubled that the Department of Justice is willing to agree to provisions which will continue to allow the networks to obtain unreasonable exclusivity from program suppliers.

3. Internal Production (Sec. V). The provisions in the proposed decree concerning network internal production of entertainment programs are among the most difficult for us to understand. The problem is not that we are unable to understand the substance of those provisions; rather, we do not understand why the Government, having with full justification asserted from the outset of this litigation that there should be no network internal production, should negotiate a consent decree with NBC which permits such a high level of internal production (2 1/2 hours of internal production in prime-time, 8 hours in daytime and 11 hours in fringe time).

The New York Times was equally concerned by the provisions in the proposed decree concerning internal production. It wrote (November 19, 1976, p. D1):

> ". . . [T]he restrictions give NBC more latitude in program ownership than it now assumes.
>
> "For instance, the agreement would limit the entertainment programs produced by NBC, or in which it held a financial interest, to two and a half hours' worth a week. At present, the only prime-time series owned by NBC is "Little House on the Prairie," which represents one hour a week.
>
> "NBC thus would be permitted to add to its program holdings, under a suit that was intended to keep the networks from favoring program series for their schedules in which they had a financial interest.
>
> "Similarly, the network would be restricted under the agreement from owning more than eight hours of daytime programs a week, during the hours between 9 A.M. and 6 P.M. although as of now it owns none." (Emphasis added)

Nevertheless, on the subject of internal production, the CIS states (p. 17):

> "While the Government at trial would have sought a complete prohibition of television entertainment program production by NBC, this judgment provides substantial relief which will prevent NBC from foreclosing significant amounts of independently produced programming from its television network."

We must respectfully disagree. Even without a detailed analysis, it is readily apparent, for example, that when each network has only 22 hours available each week for prime-time entertainment programming,* a judgment which permits

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* Although "prime-time" as defined in the proposed decree is 5 hours a night, or 35 hours a week, by virtue of the

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a network to preempt what amounts to almost one full evening of prime-time entertainment programming for its own programs does not provide "substantial relief."

Internal production by a network, as we have shown, is clearly an unfair competitive practice. It should not be tolerated or sanctioned by the Government.

Moreover, we respectfully submit that the closely related network practice of acquiring exclusive rights to talent (see pp. 29-30, supra) is also an unfair competitive practice which should not be tolerated. On this subject, the proposed decree is silent.

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fn cont'd

prime-time access rule and local and network news programs during "prime-time," there are in fact, only 22 hours available to the network for entertainment programming.

* * *

It would unduly lengthen these comments to discuss in detail other provisions of the proposed decree which purport to grant the program suppliers some measure of relief in such areas as pilot rights or "spin-off" rights. The provisions are lengthy and, although complex, a meaningful analysis would demonstrate that the relief obtained is either non-existent or de minimus.

In any event, we believe such a discussion is unnecessary. If there are some provisions of the proposed decree which provide for some minimal changes in network procurement practices for the benefit of program suppliers, they are not sufficient to overcome the proposed decree's total lack of impact in the major areas discussed above.

4. Parallelism. There remains, however, one remaining aspect of the proposed decree which requires discussion. Having failed to achieve any meaningful relief against network abuses, the proposed decree compounds the plight of outside program suppliers by providing a method for the continuance of anti-competitive and parallel practices by all three networks.

Thus, Section VII of the proposed decree provides that certain key provisions (e.g., "restrictions" on options,

or on internal production) shall not take effect

> "until similar injunctive relief is obtained in Final Orders, Judgments or Decrees entered against CBS in United States v. CBS Inc. . . . and against ABC in United States v. American Broadcasting Companies, Inc. . . . which are not appealable or from which no timely appeal has been taken."

Hence, by virtue of Section VII, when read together with Section IX which entitles NBC to modification of its decree if the final order in either U.S. v. CBS or U.S. v. ABC, shall "order or decree for either CBS or ABC injunctions different in terms or provisions than those required" by the NBC decree, the proposed decree provides a method for the drafting of a standard anti-competitive form of contract to be forced on independent program suppliers by all three networks.*

The proposed decree, by its explicit terms, guarantees that for the future the three networks will be able, as to pivotal economic terms of their contracts with program suppliers, to continue what they have done in the past: avoid the hazards of price competition by offering and requiring program suppliers to accept virtually identical terms from all three networks.

There is, as we read it, no explanation for this unusual result in the CIS. With regard to Section VII, the Government says (pp. 13-14):

> "In order to avoid placing NBC at a competitive disadvantage with respect to CBS or ABC, this provision would delay the effectuation of certain Sections of the judgment [V, VI(C), VI(E)(i), and VI(F)-(H)] until similar injunctive relief is obtained against CBS and ABC."

And, as to Section IX, the CIS states (p. 14):

> "If a non-appealable judgment were entered dismissing either of the companion actions against CBS or ABC or decreeing injunctions different from those in this judgment, this provision would permit NBC to seek and obtain whatever relief, if any, was necessary to prevent it from being placed at a competitive disadvantage with respect to CBS or ABC. While this type of provision is unusual in an antitrust judgment, it is warranted by the unique nature of this industry, and the pendency of the companion actions."

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* There is another important consequence of Sections VII and IX. Since ABC and CBS have publicly announced that they will vigorously continue to defend the Government's actions against them and since the effective date of the provisions of the proposed NBC decree which deal with the meaningful antitrust violations of the networks (even if they do not provide meaningful relief) are delayed until final non-appealable orders are entered against CBS and ABC, the proposed decree with NBC cannot be justified on the ground that it will bring protracted litigation to a rapid conclusion and provide immediate significant relief. We must, therefore, record our dissent as to the following statements in the CIS (p. 16):

> "A full trial on the merits was considered as an alternative to settlement. However, because the agreed to relief would be substantially equivalent to that sought in the complaint, because significant relief would become effective upon entry of the judgment, and finally because appeals following a trial could delay the obtaining of

fn. cont'd

fn. cont'd

> effective relief for a period years, the alternative of a trial on the merits was rejected."

But the CIS does not explain what is "unique" about the nature of this industry which justifies these "unusual" provisions. And the CIS does not explain the "competitive disadvantage" NBC would suffer if these provisions were not in the proposed decree.

There is, of course, in our view, something "unique" about the television industry (as we have already shown) -- there are only three principal buyers of high quality, original programs who engage in parallel practices and offer virtually identical terms to program suppliers to eliminate any meaningful price competition among themselves. And when these anti-competitive practices are challenged, the networks always defend themselves by arguing that to require any of them to act otherwise would place that network at a "competitive disadvantage."

What makes Sections VII and IX of the proposed decree even more difficult to understand is that the CIS in a footnote on page 6 clearly recognizes the impact of parallel practices and uniform contract terms on competition.* In text at pp. 5-6, the Government writes:

> "However, despite the FCC financial interest and syndication rules, NBC and the other networks continued to exact from producers such rights as: (1) long-term yearly renewal options for exclusive NBC network exhibition of the program with pre-set license fee escalation rates, (2) exclusive use of the program by NBC as against other communications markets, (3) exclusive rights in NBC with respect to program spinoffs, (4) creative program controls in NBC, (5) NBC's right to all profits from network exhibition of the producer's program, and (6) an NBC right of first refusal at the end of the option period."

Then as a footnote to the foregoing sentence, the CIS states (p. 6):

> "At the same time, similar practices are being followed by ABC and CBS with respect to programming on their networks. The existence of uniform terms and conditions of purchase among the three major networks acts to deprive independent program suppliers of the benefits of network competition for their programs. Moreover, the network practice of obtaining exclusive exhibition rights often occurs at a time when the program is in the idea or script stage and the program supplier has little or no bargaining power." (Emphasis added)

It is difficult to understand why the Government should, on the one hand, recognize that "uniform terms and conditions" among the three networks is an anti-competitive practice and then, on the other hand, in Sections VII and IX, agree to a proposed decree which virtually insures no change in that state of affairs.

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* One other aspect of Sections VII and IX that should be changed is that the Government, neither in those sections nor anywhere else in the decree, reserves for itself the right to obtain modification of the decree in the event that the Court, after a trial on the merits against CBS or ABC, should impose more stringent restrictions than are contained in the proposed NBC decree.

The proposed decree should not become the vehicle which blesses an industry-wide anti-competitive standard contract or code of behavior and which "deprive[s] independent program suppliers of the benefits of network competition for their programs."

At the very least, NBC -- if it desires to avoid the expense and risks of a protracted antitrust lawsuit -- should not be entitled to the umbrella of protection against "competitive disadvantage" provided by Sections VII and IX.

Conclusion

The Government should withdraw its consent to the proposed decree because it suffers from the serious defects we have discussed in these comments. The proposed decree provides no meaningful relief against the major network antitrust violations. On the contrary, it legitimizes past illegal practices and provides a vehicle for preserving an industry-wide, anti-competitive code of behavior.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for the Commenting Parties
345 Park Avenue
New York, N.Y. 10022

March 1, 1977

Appendix A

Program	Network	Seasons of Concurrent Runs in Different Day Parts	Type of Concurrent Run
ALL IN THE FAMILY	CBS	75-76, 76-77	Prime & Day
ANDY GRIFFITH SHOW	CBS	66-67, 67-68	Prime & Day
BEVERLY HILLBILLIES	CBS	66-67, 67-68, 68-69, 69-70, 70-71	Prime & Day
BEWITCHED	ABC	67-68, 68-69, 69-70, 70-71, 71-72	Prime & Day
BRADY BUNCH	ABC	72-73, 73-74	Prime & Day
CANDID CAMERA	CBS	66-67	Prime & Day
DATING GAME	ABC	66-67, 67-68, 68-69, 69-70	Prime & Day
FAMILY AFFAIR	CBS	70-71	Prime & Day
THE FUGITIVE	ABC	66-67	Prime & Day
HAPPY DAYS	ABC	75-76, 76-77	Prime & Day
KOJAK	CBS	76-77	Prime & Lat Nite
LASSIE	CBS	66-67, 67-68, 68-69, 70-71	Prime & Syndication
LET'S MAKE A DEAL	ABC	68-69, 69-70, 70-71	Prime & Day
LOVE AMERICAN STYLE	ABC	70-71, 71-72, 72-73, 73-74	Prime & Day
LUCY SHOW	CBS	67-68, 68-69	Prime & Syndication
MY THREE SONS	CBS	71-72	Prime & Day

Appendix A

Program	Network	Seasons of Concurrent Runs in Different Day Parts	Type of Concurrent Run
SUNDAY MYSTERY MOVIE - MC CLOUD - COLUMBO - MC MILLAN	NBC/CBS	76-77	Prime & Late Nite
NEWLYWED GAME	ABC	66-67, 67-68, 68-69, 69-70, 70-71	Prime & Day
ROOKIES	ABC	75-76	Prime & Late Nite
SANFORD & SON	NBC	75-76, 76-77	Prime & Day
THAT GIRL	ABC	68-69, 69-70, 70-71	Prime & Day
TO TELL THE TRUTH	CBS	66-67	Prime & Day
STREETS OF SAN FRANCISCO	ABC	76-77	Prime & Late Nite
MARCUS WELBY, M.D.	ABC	74-75	Prime & Syndication
IRONSIDE	NBC	73-74	Prime & Syndication
WAGON TRAIN	ABC	63-64, 64-65	Prime & Day

Source: ARBITRON SYNDICATED PROGRAM ANALYSIS

Mr Hansen 3106
Mr Kaplan
Mr Sullivan
Mr Selby
Mr O'Reilly
Mr Shea

TANDEM Productions INC.

ALAN F. HORN

March 3, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: United States vs. National Broadcasting Company, Inc.

Dear Mr. Hollander:

I recently read the comments, on the proposed consent decree in connection with the above action, which were forwarded to you by the the firm of Paul, Weiss, Rifkind, Wharton and Garrison, on behalf of several companies that produce television programs for the three national networks. In reviewing these comments with Messrs. Norman Lear, Bud Yorkin, and Jerry Perenchio, I find that, while our own experience with the three networks is not entirely consistent, we share many of the opinions expressed and agree in principle with the views of the signatory companies. Accordingly, on behalf of Tandem Productions, T.A.T. Communications Company, and Bud Yorkin Productions, I endorse the comments of the signatory companies and join with them in requesting that the Department of Justice withdraw its consent to the proposed decree.

Sincerely yours,

Alan F. Horn
Executive Vice President

AH/jb

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TWX: TANDEM • TAT • LBA

Mr Hansen 3106
Mr Kaplan
Mr Sullivan
Mr Selby
Mr O'Reilly
Mr Shea

Enterprises Inc.

MEL D. BLUMENTHAL
Vice President, Business Affairs

March 16, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: United States vs. National Broadcasting Company, Inc.

Dear Mr. Hollander:

I recently reviewed with Messrs. Grant Tinker and Arthur Price the comments, on the proposed consent decree in connection with the action referred to above, which were sent to you by the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, on behalf of several companies that produce televisoin programs for the three national television networks. Although in our dealings with the networks we have not experienced all of the matters set out in the comments, we do share many of the opinions expressed therein and agree in principle with many of the views of the signatory companies. Therefore, on behalf of MTM Enterprises, Inc., MTM Enterprises and MTM Productions, Inc., I join with the signatory companies in requesting that the Department of Justice withdraw its consent to the proposed decree.

Very truly yours,

MEL D. BLUMENTHAL

MDB:ng

Note: Mailgram copy sent to Bernard Hollander on 3/16/77.

• STUDIO CENTER • 4024 RADFORD AVE. • STUDIO CITY, CALIF. 91604 • (213) 763-8411

Enterprises Inc.

MEL D. BLUMENTHAL
Vice President, Business Affairs

March 18, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: United States vs. National Broadcasting Company, Inc.

Dear Mr. Hollander:

On March 16, 1977, I sent you a Mailgram on behalf of MTM Enterprises, Inc., MTM Enterprises, and MTM Productions, Inc., requesting that the Department of Justice withdraw its consent to the proposed decree.

In my mailgram, I inadvertently neglected to mention the various television series and special programs produced by our companies, and would like to take this opportunity to advise you of the television productions in which we are involved:

1. "Mary Tyler Moore Show"
2. "The Bob Newhart Show"
3. "Rhoda"
4. "Phyllis"
5. "The Tony Randall Show"
6. "The Ed Asner Show"

In addition to the series mentioned above, we have just completed production of a one-hour dramatic pilot and two half-hour comedy pilots for CBS, two half-hour comedy pilots for ABC, and a half hour comedy pilot for NBC. We also recently produced a two-hour television motion picture

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special entitled "Something For Joey" which will be broadcast by CBS on April 6 under the sponsorship of IBM. We have, in various stages of development, a number of additional television series, motion pictures for television and specials, including a major twelve-hour dramatization for NBC of William Goldman's "Boys & Girls Together".

If I can be of any further assistance to you, please do not hesitate to call.

Very truly yours,

MEL D. BLUMENTHAL

MDB:ng

LORIMAR PRODUCTIONS, INC.

4000 WARNER BLVD. · BURBANK, CALIFORNIA 91522

(213) 843-6000

March 17, 1977

Bernard M. Hollander, Esq.
Chief, Judgments and Judgment
Enforcement Section
Antitrust Division
United States Department of Justice
Room 3706
Washington, D.C. 20530

Re: United States v. National Broadcasting Company, Inc., Civil No. 74-3601 - RJK, U.S.D.C., C.D., Cal.

Dear Mr. Hollander:

I am Vice President, Business Affairs, of Lorimar Productions, Inc., which currently produces three one-hour television network series and has a continuing flow of other television network programs in development and production.

I have reviewed with Lee M. Rich, President of Lorimar Productions, Inc., the recent letter and comments from Arthur L. Liman of Paul, Weiss, Rifkind, Wharton & Garrison dated March 1, 1977 concerning the proposed consent decree with NBC.

Although Lorimar has not encountered each of the matters set forth in the comments, we certainly do agree in principle and share many of the opinions and views of the signatory companies.

In view of the foregoing, on behalf of Lorimar Productions, Inc., we concur with the request that the Antitrust Division of the Department of Justice withdraw its consent to the proposed decree.

Very truly yours,

BILLIE GOLD

BG:ds
Note: Telegram sent to Bernard Hollander on 3/17/77

Charles Fries
President

March 21, 1977

Bernard Hollender, Esq.
Chief of Judgment & Judgment
Enforcement Section - Antitrust Div.
U.S. Department of Justice
10 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Re: USA v. NBC - Civil Action #74-3601 R.J.K.

Dear Mr. Hollender:

I recently read the comments on the proposed Consent Decree in connection with the above action, which were forwarded to you by the firm of Paul, Weiss, Rifkin, Wharton and Garrison on behalf of several companies that produce television programs for the three national networks.

In reviewing these comments I find that, while our own experience with the three networks is not entirely consistent, we share many of the opinions expressed and agree in principle with the signatory companies. Accordingly, on behalf of Charles Fries Productions, I endorse the comments of the signatory companies and join them in requesting with them the Department of Justice withdraw its consent to the proposed decree.

Very truly yours,

Charles W. Fries

CF:g

4024 NORTH RADFORD AVENUE STUDIO CITY, CA 91604 / PHONE (213) 763 8411

3706 Mr. Hollander
Mr. Kaplan
Mr. Sullivan
Mr. Selby
Mr. O'Reilly
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IRV N. GROSS
RANDALL E. GREER
D. STEVE CAMERON

OF COUNSEL
JAMES J. COYLE
SAMUEL SACKS

March 23, 1977

Mr. Bernard Hollander, Esq.
Chief of Judgment & Judgment
Enforcement Section - Antitrust Division
U.S. Department of Justice
10 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Re: USA vs. NBC - Civil Action #74-3601 R.J.K.

Dear Bernie:

We have noted the comments made by the various TV production organizations objecting to the proposed Consent Decree.

We are sure you know, that based on the conversation Charles Fries (Chairman of the Caucus Steering Committee) and we had with you and your associates, that we are in agreement with such comments. We have found such comments to be generally consistent with our expressed objections.

Again, on behalf of the Caucus of Producers, Writers and Directors, we endorse the comments of the various Production Companies which have requested that the Department of Justice withdraw its consent to the proposed degree.

Best wishes.

Very Sincerely Yours,

SIMON & SHERIDAN

Samuel Sacks

SS:ke

cc: Charles W. Fries

23-211 62
DEPARTMENT OF JUSTICE
27 MAR 29 1977
RAO
R C E I V E D

GOODSON-TODMAN PRODUCTIONS

MARK GOODSON

375 PARK AVE. • NEW YORK, NEW YORK 10022 • PLAZA [illegible]

February 25, 1977

Mr. Bernard Hollander
Anti-Trust Division
U.S. Department of Justice
10 Pennsylvania Avenue NW
Washington, D.C. 20530

RE: USA v. NBC
Civil Action #74-3601 R.J.K.

Dear Mr. Hollander:

Goodson-Todman Productions herewith files its objection to The Proposed Final Judgment in the case of the United States of America v. National Broadcasting Company, Inc., Civil Action #74-3601 R.J.K.

Goodson-Todman Productions is an independent program packaging company. We license programs to the national networks as well as to individual television stations. At the present time Goodson-Todman Productions supplies four different daytime program series to the CBS Television Network and one daytime program series to the ABC Television Network.[1/] Although we license several programs directly to NBC owned television stations, we have supplied no program series to the NBC Television Network since 1969.

On March 14, 1973 we did a run-thru of the program entitled "MATCH GAME" for the NBC Television Network. The NBC Program Department recommended the program for development to NBC management, and negotiations then ensued between NBC Business Affairs and Goodson-Todman Productions.

1/ As of this writing, we supply CBS and ABC their highest rated daytime programs (Nielsen Television Index, February 7-13, 1977).

It was quickly established by NBC Business Affairs that, as a matter of general network policy, any possibility of making a "deal" was preconditioned on our willingness to grant NBC an exclusive "hold" on the property for 15 months (five calendar quarters) following the production of the pilot, and options for no less than ten years after the first telecast (cancellable by the network, only, at the end of any 13 week cycle during the first five years and at the end of any 26 week cycle during the second five years). Further, during that ten year period, the network was to be free to charge advertisers whatever prices the success of the program might make possible in the marketplace, but Goodson-Todman Productions was to be limited to 5% annual increases in the first five year period and 7½% increases in the second five year period.[2/]

To have submitted to this one-sided arrangement would have meant that if our program's popularity had slipped at any time during the ten year option period, the network would have had the unilateral right of cancellation on short notice. On the other hand, if the show became a hit, the network was free to charge whatever prices it could get for it without our participation in profits. We, of course, had no right of cancellation whatsoever. A clear case of heads they win, tails we lose.[3/]

We considered these "non-negotiable" demands unconscionable and a clear reflection of the overwhelming imbalance in negotiating positions

2/ NBC also demanded approval rights over all celebrities booked on the program.

3/ Moreover, regardless of its degree of success, the likelihood of a program such as "MATCH GAME" surviving a ten year period is too remote to make meaningful any hypothetical possibility of more favorable renegotiation a decade later.

between the independent daytime program supplier and NBC. We decided that the time had come to refuse to submit to such demands at the risk of losing the sale. We terminated further negotiations with NBC.

After the passage of approximately three weeks, an NBC program executive requested that we resume negotiations with NBC in an effort to arrive at a mutual agreement. We undertook to do so and, once again, we were confronted by NBC Business Affairs with the identical non-negotiable demands for a fifteen month hold and one-sided options for ten years. Faced with this unyielding position by NBC, we entered into an agreement with CBS and granted that network options to the program for a period of seven years. Frankly, the seven years of options we granted to CBS were also excessive, but with only three network buyers available, we had little choice but to accede to the terms. "MATCH GAME" went on the air in 1973, and since that time it has ranked among the most popular daytime programs. 4/

By its failure to impose limitations on the number of option years NBC may demand in daytime program agreements (such as NBC demanded for "MATCH GAME"), The Proposed Final Judgment leaves undisturbed one of the most onerous and anticompetitive practices that characterize the network marketplace at the present time. While it is true that the Justice Department's inquiry into network practices originally focussed only on prime time programming, The Proposed Final Judgment nevertheless does enter the arena of daytime programming by setting forth certain limitations on NBC

4/ "MATCH GAME" is currently the highest rated daytime program in network television (Nielsen Television Index, February 7-13, 1977).

with respect to the number of programs owned by the network. Accordingly, the limitations of the original intention should not be deemed to justify leaving undisturbed the most blatant and indefensible anticompetitive network practices in the very same time bloc. At the very least, the network should be prohibited from obtaining options for a longer period of time for daytime programs than for prime time programs.

However unsatisfactory the situation of the independent program producer may be with respect to prime time programming on the networks, there are from 18 to 28 different weekly programs on each of the three networks during this time bloc. In the time bloc from 10:00AM to 4:30PM, however, there are only ten different program series on the NBC weekly daytime schedule. The imbalance between NBC and the program supplier is, therefore, even greater than in prime time and calls for no less relief from anticompetitive practices.

The Department of Justice should withdraw its approval of the Proposed Final Judgment and, failing that, the Court should refuse to sanction the consent decree unless modifications are made to provide appropriate relief.

Very truly yours,

GOODSON-TODMAN PRODUCTIONS

By Mark Goodson
Mark Goodson

Response to the Comments Submitted by Television Entertainment Production Companies.

Various television producers and production companies have filed comments on the proposed decree. 1/ Because these comments involve several different provisions of the Judgment, and since there was much overlap, this will constitute a response to all of them. The comments generally express opposition to entry of the proposed Judgment because, they say, certain of its provisions do not adequately rectify NBC's violations of the antitrust laws. These objections will be discussed, provision by provision.

The only issue for decision here is whether entry of the proposed Judgment is in the public interest because its provisions are consistent with the allegations of the complaint and the enforcement of the antitrust laws. 2/ We have no disagreement with the opinion expressed by the commentors that network practices have violated the antitrust laws. 3/ However, while antitrust consent settlements are an appropriate and beneficial enforcement tool, as to which the Attorney General has broad discretion, compromise is normally involved. 4/ In this particular case, the Government believes that the proposed Judgment is desirable

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1/ They consist of: The Caucus for Producers, Writers and Directors; United Artist Corporation; Metro-Goldwyn-Mayer, Inc.; Columbia Pictures Industries, Inc.; Goodson-Todman Productions; Paramount Pictures; Twentieth Century-Fox Film Corp.; Warner Bros. Inc.; Universal City Studios, Inc.; Tandem Productions; T.A.T. Communications Co.; Bud Yorkin Productions; MTM Enterprises; MTM Productions, Inc.; Lorimar Productions, Inc.; Charles Fries Productions, Inc. In addition, comments filed by the Citizens Communications Center also discussed certain provisions of the Judgment.

2/ For a full explanation of the Procedure and Standard of Review established under the Antitrust Procedures and Penalties Act, see Response to Comments submitted by American Broadcasting Companies, Inc. ("ABC"), Section I at 2-7.

3/ Further, we allege that these violations are continuing, and it is largely because of their continuing nature that we seek immediate relief which we believe ameliorates such violations as to NBC.

4/ As the Court stated in United States v. Armour & Co., 402 U.S. 673, 681 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, the expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise, in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

Form OBD-183 12-8-76 DOJ

because it would provide at once relief which is similar to and consistent with that sought in the complaint. 5/

1. The Production Limitation of Section V.

All of the commentors object to the proposed limitation on NBC's production of entertainment programs for its own network. They say that NBC ought to be prohibited entirely from producing any entertainment programs for its network. They further maintain that the production limitation provided in the decree is inappropriate because NBC actually produces less today than the amount permitted, and because NBC may still be able to use the threat of such production to force the producers to give up valuable rights and interests in their programs.

In our view, Section V, which would limit the amount of entertainment programming that could be produced by NBC, should enhance competition in the television entertainment program production market, "by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers." [CIS at 8]. A central allegation of the case is that NBC's "unrestricted ability to produce prime time television entertainment programming, together with its domination and control over access to its combined and affiliated group of television stations and its course of conduct, constitutes an unreasonable restraint of non-network program producers'

/////

5/ See CIS at 2, 7-15.

ability to produce and negotiate for distribution and exhibition of their programming." 6/

The production limitation in Section V would prohibit NBC, for 10 years, from producing an unlimited amount of its own entertainment programming. Paragraphs IV(A) and IV(B) would permanently prohibit NBC from acquiring rights or interests in the programs produced by others, or engaging in domestic syndication, and Paragraph VI(A) would prohibit NBC from conditioning a supplier's access to its network on the supplier's grant to NBC of any other right or interest. These three injunctions together seek to insure that NBC, while permitted to provide a source of competition in program production, will no longer abuse its market power and gain unfair competitive advantages over independent program suppliers. These provisions should effectively curtail the anticompetitive effects described in the complaint. Further, Sections IV(A) and (B) and VI(A) would take effect immediately upon entry and thus provide substantial relief much earlier than if a trial on the merits were required.

2. The Program Option Period Limitation in VI(E)(1).

All of the commentors object to Section VI(E)(1) as providing insufficient relief. 7/ This provision would limit

6/ Supplemental Statement of Genuine Issues, filed May 21, 1976, Issue I(G).

7/ In addition, Goodson-Todman Productions objects to this Section because it does not apply to daytime entertainment programming. This case, however, was directed primarily at

to four the number of yearly program renewal options NBC may acquire from a program supplier initially, and would only permit one additional option year if the agreement terms were renegotiated. Although the commentors concede that this is a desirable limitation on current industry practice, they assert that it does not go far enough to provide meaningful relief.

Historically, a network obtained program renewal options for 5 years in the initial contract. Immediately after promulgation of the FCC rules, however, the networks began to demand and obtain initial program options of 6 or 7 years. Further, the initial option period for many programs is extended whenever the producer requests an increase in the license fee. 8/ This Judgment provision, by shortening the permissible option period, will increase competition for successful programs at an earlier point, and will permit program producers to share in the economic benefits of such programs at an earlier time. This should encourage program suppliers to produce more entertainment programming and make entry into the market more attractive, thus enhancing competition.

7/ continued

prime time programming [Complaint, Par. 16]; its settlement does not prevent any person from pursuing any course of action against NBC.

8/ License fees for the entire term of the contract are set when the network agrees to pay for a script or a pilot, long before a true measure of the program value can be ascertained, and often before accurate cost estimates can be made.

None of the commentors have urged that the present length of the program option term is a per se violation of the antitrust laws. Rather, they contend that its present length unreasonably restrains trade and reflects an unreasonable use of monopoly power. The Judgment provides relief as to this practice without risking the delays and uncertainties of a full trial on the merits.

Some comments criticize this provision because it does not aid producers whose programs are cancelled after one or two years. 9/ Initially, the Government sought a 2 year limit on the option period, but compromised on this provision. See CIS at 17-18. In our view, the relief actually obtained is substantial, and while it does not aid short-term programs, antitrust relief cannot be expected to bail out unpopular or unsuccessful programs. The overall relief, including this provision, is consistent with the complaint, with the relief sought and with enforcement of the antitrust laws.

3. Limitations on Program Exclusivity as Against Other Commercial TV Uses in VI(E)(ii).

Presently, NBC (as well as CBS and ABC) acquire total domestic exclusivity for a television program as against any other television use for the entire prospective term of the licensing contract agreed to by the producer. As noted above, the usual term is initially 5-7 years, and with extensions may run much longer. The only time the network's

9/ See, e.g., Comments of the Caucus for Producers, Writers and Directors ("Caucus") at p. 2.

exclusivity is waived is when the network itself wants to strip the program, i.e., exhibit program reruns on its own network in non-prime time. If that occurs, the present exclusive contract term prevents any competition for stripping rights from other networks or television stations. Section VI(E)(ii) deals with this problem.

The Caucus, the Columbia Pictures group, and the Citizens Communications Center 10/ object to Section VI(E)(ii), which would limit NBC's ability to acquire exclusivity rights, as inadequate. This provision would keep NBC from exercising exclusivity rights over a prime time television program against other television uses for more than three years, except that NBC could acquire four years of exclusivity as against non-prime time stripping of a series, and could enjoy total exclusivity during prime time for the life of the program contract. In addition, whereas, under current

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10/ The Columbia Pictures Group, represented by Paul, Weiss, Rifkind, Wharton & Garrison, are: Columbia Pictures Industries, Inc.; Goodson-Todman Productions; Paramount Pictures; Twentieth Century-Fox Film Corp.; Warner Bros. Inc.; and Universal City Studios, Inc. In addition, the following companies filed comments agreeing with many of the comments of the Columbia Pictures Group: The Caucus for Producers, Writers and Directors; Tandem Productions; T.A.T. Communications Co.; Bud Yorkin Productions; MTM Enterprises; MTM Productions, Inc.; Lorimar Productions, Inc.; and Charles Fries Productions, Inc.

practice, the network sometimes acquires rights (including first refusal rights) to strip the program on its own network during or after the contract term, when the initial licensing agreement is reached, under the Judgment NBC could no longer acquire such a right at that time. Only after NBC had ordered the program series could it compete with other networks or television stations to acquire stripping or other exhibition rights to old episodes. To prohibit NBC from ever acquiring such rights would have the anticompetitive effect of limiting competition for these uses of television programs.

The Government's discovery has disclosed that a network program series usually must have been broadcast during prime time for three years before there are enough episodes to syndicate, and for four years before there are enough to strip. This Section of the Judgment is designed to open up the syndication and stripping markets to competition as soon as there is enough product to sell, and such relief would clearly be significant.

4. Limitation on Exclusivity as Against Pay Cable Television in Section VI(E)(iii)(c).

This provision, which would have limited network program exclusivity for theatrical feature films as against pay cable television, has been deleted from the Judgment by stipulation of the parties. 11/ The reasons for its deletion are

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11/ Of the television production entities, only United Artists Corporation and Metro-Goldwyn-Mayer Inc. filed comments on this Section.

fully explained in the Response to the Comments Submitted by Congressional, Public Interest and Pay Cable Television Entities opposing Section VI(E)(iii)(e) of the proposed Judgment.

5. Limitation on Exclusivity with Regard to Pilots in Section VI(F).

The Caucus objects to Section VI(F), which would prohibit NBC from retaining exclusive hold to more than 35% of the pilots produced for it past fixed dates; July 1 for fall season pilots and January 1 for "second season" replacement pilots. After those dates, 65% of these pilots could be marketed elsewhere, in which event NBC would be entitled to recover its costs of pilot production. The objections are that NBC would still be allowed too long a hold on the pilot, and that it is unfair to require the producer to reimburse NBC's production outlays.

Many more pilots are produced for NBC each year than it can possibly use, but because its exclusive hold on fall season pilots extends well into that season, the producer is effectively prevented from seeking another buyer, even for "second season" replacement. NBC has now agreed to release its hold on 65% of its fall season pilots on June 1 (rather than July 1), thus providing an added opportunity for the producer to sell the rejected program to another buyer for the fall season, and a good opportunity for "second season" replacement. This provision is designed to permit competition for program pilots after the network which advanced funds for them has had an opportunity to decide whether it will schedule the series.

/////

In our view, it is not unfair, if the program is sold to another buyer, to require the producer to reimburse NBC for its pilot outlays. If NBC has broadcast the pilot before it is released and sold, then the producer gets a credit of two-thirds of NBC's costs for the first broadcast and full credit for more than one broadcast.

6. The Delay of Effective Dates of Certain Provisions in Section VII and NBC's Right to Seek Relief from the Judgment in Section IX.

Section VII would delay the effectuation of certain provisions of the Judgment until similar injunctive relief is obtained from CBS Inc. ["CBS"] and American Broadcasting Companies, Inc. ["ABC"]. Section IX would permit NBC to seek relief from the Judgment if a non-appealable order were entered dismissing the CBS or ABC cases or ordering dissimilar injunctive relief against either CBS or ABC. The Columbia Pictures Group objects to both sections, stating that their inclusion is not explained and that they will insure uniform practices in the industry [Columbia Pictures Group Comments at 47-52].

These actions were not brought to eliminate the three networks, but to limit their use of market power and encourage as much competition as possible within this three program buyer market structure. By opening up the stripping and syndication markets, by limiting network production, and by reducing program renewal options, the Judgment seeks to encourage competition in television entertainment program production both among networks and between networks and

other broadcasters. Moreover, the injunctions in Sections IV and VI(A)-(C) should prevent NBC from abusing its market power when acquiring network exhibition rights.

This is an unusual industry in that the three networks are the only licensors of commercial television programming for simultaneous nationwide broadcasting. Each network as a purchaser has enormous market power, not subject to meaningful competition from the other networks or from non-network stations. This Judgment seeks to limit NBC's use of its power in purchasing television entertainment programs. If, however, the Court were to decide after a trial not to prohibit or limit the use of similar market practices by CBS or ABC, then it might be appropriate for NBC to seek relief from any portions of this Judgment which place it at a competitive disadvantage vis-a-vis CBS and ABC. For example, while Section VI(E)(ii) of the Judgment would limit to three years the number of years a prime time program may be exclusive to NBC (as against syndication in other day parts), the present network practice is to require such exclusivity for the length of the initial 5-7 year contract, plus extensions which may run substantially longer. Should the Court after trial fail to award similar relief against CBS and ABC, then NBC should be free to seek modification of this provision, upon a showing that otherwise it would be placed at a competitive disadvantage.

The same analysis is valid with respect to those other portions of the Judgment, which pursuant to Section VII will not become effective until similar injunctive relief is obtained against CBS and ABC. For example, Section V of the

Judgment would among other things enjoin NBC from producing for its own network use, more than 2-1/2 hours of prime time entertainment programming per week plus 2 additional special programs every six months. Were the Court to rule after trial that CBS's or ABC's unlimited power to produce entertainment programming should not be curtailed, then NBC, because of the peculiar structure of the market 12/, should not be subject to such a prohibition.

7. Network Contracts for the Exclusive Use of Talent or Literary Properties.

A separate point raised in the comment of the Columbia Pictures Group was that the networks have been entering into exclusive contracts directly with talent. 13/ Upon investigation, it was learned that an apparently new and growing practice of the networks, particularly ABC and CBS, has been to acquire exclusive contracts with talent (performers, producers, directors and writers) 14/, or to acquire exclusive

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12/ See CIS at 5-6. It should be noted, however, that the Government has not conceded that each provision which does not become effective until similar relief is obtained against CBS and ABC would place NBC at a competitive disadvantage, if it were applicable to NBC alone.

13/ Comments of Columbia Pictures Group at 29-30.

14/ The Government is presently seeking limited discovery on these contracts. Thus, the information contained herein is based on numerous conversations with industry participants, who may not always have first hand information.

exhibition rights to literary properties, and then to "lay-off" the talent or the property on an "independent" producer. 15/ In this way, a network tries to avoid labeling a program an "in-house" program, but still retains a large degree of control over it. Then, if the network decides never to go to series from a pilot or cancels a program series that has been on the air, the producer can be precluded from seeking to sell the program elsewhere, since he cannot command the use of one or more of the major elements of the program.

When a single network has an exclusive hold on talent or on a property, no other network can compete for the talent or property in question. Moreover, the independent producer is in no position to bargain at arms-length over terms of the production contract or program license proferred by the network, since the latter has already established the terms of the talent's employment. It is apparent that, all other things being equal, the network will attempt to fill its scarce air time first with talent and properties to

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15/ It appears that a network will "lay-off" a talent or property by assigning its contractual rights for the use of said talent or property to an independent program producer in connection with a program production agreement. The talent or property assigned normally reverts to the network at the termination of the agreement.

which it holds exclusive contracts. 16/ Consequently, the producer is not even in a position to simply refuse to use the talent or property, since he knows that if he refuses, another producer will agree to produce the pilot or program.

The Government considered various ways of limiting NBC's use of these exclusive contracts in the proposed Final Judgment, but decided that a specific provision appeared unwarranted at this time. It was decided, therefore, that a satisfactory resolution of this problem was to agree with NBC that further relief under the Judgment or by a new action could be sought, if it were later found that NBC had used exclusive contracts so as to impede competition. Such an agreement is embodied in a stipulation being filed with the Judgment. 17/

16/ While we understand that no talent contract actually guarantees that particular programs will be broadcast, they apparently provide that the talent will be paid regardless of whether or not the program is broadcast.

17/ The Stipulation, in pertinent part, provides:

> 2. Recognizing that the proposed Final Judgment does not specifically deal with the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, the parties have nevertheless agreed that the entry of this Final Judgment shall not preclude plaintiff, upon a showing that defendant has used such exclusive rights to impede competition in the

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17/ continued

television entertainment programming field or to circumvent any provision of the Final Judgment, from applying to the Court for relief under the Judgment against such conduct, provided that such relief would not place NBC at a competitive disadvantage with respect to CBS or ABC.

3. This Stipulation and Order, the above modifications, and the original inclusion and subsequent deletion of Section VI(E)(iii)(e) from the proposed Final Judgment, shall not estop plaintiff or defendant, or any person, in this or any other action or proceeding, from asserting any issue of fact or law as to the subject matter of Section VI(E)(iii)(e) or as to the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, nor shall they constitute any evidence or admission as to any such issue.

Bernard M. Hollander

Bernard M. Hollander

Attorney for the United States

Form OBD-183
12-8-76 DOJ

4296 Wilkie Way, #H
Palo Alto, California 94306
November 29, 1976

The Honorable Robert J. Kelleher
District Judge, Central District
U. S. District Court
312 No. Spring St.
Los Angeles, California 90012

60-211-62
DEPARTMENT OF JUSTICE
DEC 1 1976
ANTITRUST DIVISION
LOS ANGELES OFFICE

Dear Sir:

It was with great dismay that I read in our local newspaper (copy enclosed) of the settlement proposed by the Justice Department in the anti-trust suit against NBC. If I am interpreting this proposed settlement correctly, it would appear that NBC is essentially being told to curtail it's production and that it must buy a certain percentage of it's programming from independent producers in the interest of "fair competition".

Is the word "competition" in this instance synonomous with saying that small producers "need" to have their programs purchased in order to survive? Since when is the "need" of a company to sell it's product a criterion for success? In a free-enterprise system is not money the name of the game? If the major networks thought they could make more money from the purchase of programs from independent producers would they not do so? Do the sponsors not in fact choose to sponsor shows they feel will make money for them? And are we, the viewers, not the final determination of the success or failure of a program? Is our freedom of choice also to be superseded by the small company's "need to survive"?

If I may be allowed to digress for a moment, I would refer you to the book, "Atlas Shrugged" by Ayn Rand. Although this is a work of fiction, it seems to me that it contains a great deal of philosophy pertinent to this lawsuit. First, the government directive known as the Equalization of Opportunity bill, allowing a company to own only one type of industry, and being required to divest itself of all others, including those purchased or started to guarantee the supply of raw materials for the end product. The reason: the less competent, the less creative, the less ambitious claimed a moral right for survival irrespective of quantity of or quality of production. When this failed, (as it must, because limitation of one is never any assurance of increased productivity of another) a quota was imposed on production. A major industrialist was brought to trial for violation of these directives and for "working contrary to the public good". I would like to quote a few lines of his response:

> "....I do not seek the good of others as a sanction for my right to exist, nor do I recognize the good of others as a justification for their seizure of my property or their destruction of my life. I will not say that the good of others was the purpose of my work -- my own good was my purpose, and I despise the man who surrenders his. I could say to you that you do not serve the public good -- that nobody's good can be achieved at the price of human sacrifice -- that when you violate the rights of one man, you have violated the rights of us all and a public of rightless creatures is doomed to destruction."[1]

[1] Ayn Rand, Atlas Shrugged, Signet Books, N.Y., p. 452

Let me go on record as saying I feel that the proposed settlement with NBC is not a settlement for the public good when it violates a company's right to production and also a consumer's right to a quality of excellence that we are in fact willing to pay for. The small producer knows when he decides to enter the industry that he is essentially going into competition with already established "corporate giants". It follows, therefore, that he also knows the only way he can survive is to produce a quality product at a mutually satisfactory price. If he fails in his attempt whose fault is it? Check your premises, gentlemen:

Is anyone stopping him from developing a product?

Is there only one company to whom he could sell his product?

Is he restricted from finding his own sponsors for a program?

Is he restricted from setting up a station of his own and using his own programming?

How then is it that he is being stopped by a trade "monopoly"?

Is this whole situation not at least a little similar to the Fair Trade Act, which also was designed to protect the small manufacturer (or producer, if you will) from the large? Was it a solution to the problem? I happen to agree with Miss Rand that no solution is ever for the public good when any individual's rights (even those of the "corporate giant") are infringed upon, most especially for no better reason than the "need" of another.

Sincerely,

Rose Marie Murphy

Rose Marie Murphy

RMM:mg

cc: James J. Coyle
Chief Attorney
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Vol. 46 / 21600
Issue No. 278 PALO ALTO, CALIFORNIA, WEDNESDAY, NOV. 17, 1976 15¢ Copy — $3.50 Month

Suit breaks TV network program hold

WASHINGTON (AP) — The [illegible] on [illegible] suit against the Justice Department ruling the other NBC accepted a broad range of restrictions on the production of entertainment programs.

Under suits against the CBS and ABC television networks are [illegible]

[illegible] terms of the settlement, [illegible] limit the amount of [illegible] programs [illegible] would have the networks [illegible] more programs [illegible] independent producers.

[illegible] would continue [illegible]

[illegible] proposed settlement was [illegible] U.S. District Court in Los Angeles and announced by the Justice Department.

[illegible] controversial provision and several other restrictions would not take effect until months hence [illegible] on the three major networks.

A Justice Department spokesman declined to discuss whether [illegible] will carry the case to trial.

A trial could take several years and delay implementation of some of the provisions of the NBC settlement.

The Justice and court invited public comment within 60 days on the proposed settlement. At the end of that period, the court decree would take effect if the court agrees.

The compromise suggests there may be a quick end to at least one part of the government's three-pronged effort to encourage competition in the production and distribution of TV entertainment shows.

The suits alleged that the three networks violated antitrust law by attempting to monopolize prime-time TV entertainment programming. Their control over access to their networks had the effect of shutting out independent producers, the government charged.

When independently produced programs were purchased by the networks, the producers were required to give up other distribution rights and comply with other network restrictions, the government contended.

The department first filed the antitrust suits in 1971 during the period the Nixon administration was criticizing network news coverage.

The antitrust suits did not involve news, sports or public affairs programs, and department officials insisted there were no political motives underlying the action.

But network executives argued there was reason to believe the suits were part of a Nixon White House attempt to intimidate the networks for their news coverage.

They demanded access to certain White House tapes which allegedly contained conversations dealing with the networks. The department refused to provide the tapes, and the judge dismissed all three suits in November 1974.

But the court gave the government the right to bring suits again.

And a month later, the department did so.

The White House tapes were not involved in the second round of suits because Nixon had left the White House by then and the suits were filed under the Ford administration.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

BMH:KRS
60-211-62

May 4, 1977

Ms. Rose Marie Murphy
4296 Wilkie Way, #H
Palo Alto, California 94306

Re: United States v. National Broadcasting Company, Inc., (Civil 74-3601-RJK C.D. Cal.)

Dear Ms. Murphy:

This letter is in response to your letter of November 29, 1976, to the Honorable Robert J. Kelleher, District Judge, Central District of California, commenting on the proposed judgment in the above-captioned case. Though not requested to do so, we will treat this letter as if submitted as a comment under the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h).

Your letter objects to the entry of that portion of the decree which limits the amount of programming which National Broadcasting Company, Inc. ("NBC") can produce for broadcast on its network. It is the belief of the Department of Justice that this provision is important since it will eliminate the chance that NBC would significantly increase its own internal production, thus foreclosing its network to outside program producers, or that NBC would use the possibility of such production as a means to obtain restrictive rights and interests in programs developed by outside program suppliers in addition to the right of network exhibition.

The Department of Justice appreciates your comments. Your letter and this response will be published in the Federal Register and filed with the Court. In addition, we are enclosing all of the comments and the Government's responses on the proposed Final Judgment.

Sincerely yours,

Bernard M. Hollander

Bernard M. Hollander, Chief
Judgments and Judgment
Enforcement Section
Antitrust Division

Enclosures

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March 1, 1977

Dear Bernie:

Pursuant to the notice dated November 17, 1976 as published in the Federal Register for November 24, 1976, at page 51992 inviting comments on the proposed consent decree in United States v. National Broadcasting Company and Judge Kelleher's order extending the time within which to file such comments to March 1, 1977, I am enclosing herewith five copies of the comments of CBS.

Sincerely yours,

Robert S. Rifkind

Bernard M. Hollander, Esq.,
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10th Street and Pennsylvania Avenue, N.W.,
Washington, D. C. 20530

Encls.

33A

BY HAND

3/4/77

COMMENTS OF CBS

ON THE PROPOSED DECREE IN
UNITED STATES v. NATIONAL BROADCASTING COMPANY
Civ. No. 74-3661-RJK (C.D. Cal.)

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March 1, 1977.

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COMMENTS OF CBS

ON THE PROPOSED DECREE IN

UNITED STATES v. NATIONAL BROADCASTING COMPANY

Civ. No. 74-3601-RJK (C.D. Cal.)

Introduction

On November 17, 1976, the United States submitted to the Court a stipulation with defendant National Broadcasting Company, Inc., providing for the entry of a final judgment upon the consent of the parties in accordance with the procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"). At the same time the Government submitted its Competitive Impact Statement ("CIS").

Pursuant to the APPA, CBS submits this memorandum, together with the affidavits annexed hereto and incorporated herein,* detailing the reasons why the proposed consent decree should not be entered. In particular, we show in Point I below that the proposed decree cannot pass muster under the public interest standard prescribed by the APPA because

(1) the proposed decree is blatantly anticompetitive and, hence, in clear conflict with the national policy declared by the Sherman Act;

(2) the proposed decree would establish a regulatory regime administered by this Court that overlaps and conflicts with the regulatory authority exercised by the Federal Communications Commission ("FCC") under the Communications Act (47 U.S.C. §§ 151 *et seq.*), resulting in prodigious and unnecessary

*Annexed as Appendix A to these comments is the affidavit of Franklin M. Fisher ("Fisher Affidavit"), sworn to February 22, 1977 (pp. 1a-64a, *infra*). Dr. Fisher is a Professor of Economics at the Massachusetts Institute of Technology. Annexed as Appendix B to these comments is the affidavit of Richard A. Posner ("Posner Affidavit"), sworn to February 23, 1977 (pp. 65a-85a, *infra*). Mr. Posner is a Professor of Law at the University of Chicago Law School. The appendices are an integral part of these comments.

duplication of effort, confusion, frustration and conflict of regulation, especially in view of the new Notice of Inquiry issued by the FCC on January 14, 1977 ("Network Practices Inquiry") comprehending every aspect of the television industry to be regulated under the proposed decree; and

(3) the proposed decree would seriously undermine First Amendment values by imposing severe limitations on NBC's freedom to engage in a form of expression.

In addition, we show in Point II below that the proposed decree should not be entered because the Government's CIS—a statutory prerequisite to the entry of the decree—does not comply with the requirements of the APPA.

I.

ENTRY OF THE PROPOSED DECREE WOULD NOT BE IN THE PUBLIC INTEREST AS DECLARED BY THE SHERMAN ACT, THE COMMUNICATIONS ACT AND THE FIRST AMENDMENT.

Under the APPA, enacted in 1974, it is the District Court's duty to determine, as a condition precedent to the entry of an antitrust consent decree, whether the decree would serve the public interest.*

*15 U.S.C. § 16(e) provides as follows:

"Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

"(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

"(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial."

Congress did not intend this list to be exhaustive. 119 Cong. Rec. 24599 (1973) (remarks of Sen. Tunney).

The legislative history makes it clear that Congress intended this public interest review by the courts to be an independent inquiry into the underlying case and the merits of the proposed decree.* Congress determined to put an end to "judicial rubber stamping" of antitrust consent decrees.** As Judge Aldrich observed in *United States* v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975):

> "The legislative history shows clearly that Congress did not intend the court's action to be merely pro forma, or to be limited to what appears on the surface. Nor can one overlook the circumstances under which the act was passed, indicating Congress' desire to impose a check not only on the government's expertise—or at the least, its exercise of it—but even on its good faith." *Id.* at 715.

Although the "public interest" standard of the APPA is not precisely delineated and is undoubtedly broad enough to encompass public policy as declared by national legislation generally, Congress made it evident that the public policy in favor of competition, as declared by the Sherman Act, was its primary concern.† It is plain that under the APPA a precondition to entry of a proposed decree is the court's determination that the decree will, as Congress intended, protect "the public by insuring healthy competition in the future".†† No such determination can be made in this case.

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*See 119 Cong. Rec. 24597-98 (1973) (remarks of Sen. Tunney); S. Rep. No. 298, 93d Cong., 1st Sess. 6-7 (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8-9 (1974).

**The report of the House Judiciary Committee states:

> "One of the abuses sought to be remedied by the bill has been called 'judicial rubber stamping' by district courts of proposals submitted by the Justice Department. The bill resolves this area of dispute by requiring district court judges to determine that each proposed consent judgment is in the public interest."

H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). *See also* 119 Cong. Rec. 24598 (1973) (remarks of Sen. Tunney).

†H.R. Rep. No. 1463, 93d Cong., 2d Sess. 12 (1974).

††S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973).

A. The Proposed Decree Is Anticompetitive and, Therefore, Inconsistent with the Policy of the Sherman Act.

The proposed decree should not be entered because it is fundamentally inconsistent with basic principles of antitrust law. A consent decree that suppresses competition and restrains trade—as this decree does—cannot be held to be in the public interest.

The proposed decree is designed to limit program production and to restrict the program rights that can be bought and sold. Those restraints may benefit particular program producers by shielding them from the rigors of competition, but they cannot promote competition. On the contrary, they are highly anticompetitive. The decree ignores the fundamental fact that the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 45 U.S.L.W. 4138, 4141 (U.S. January 25, 1977).

To put the matter as simply as possible, if NBC were to agree with ABC and CBS to a limitation on either its program production or the program rights it would seek to acquire from its suppliers, that agreement would without question constitute a *per se* violation of the Sherman Act.* No further analysis would be needed or indeed permitted. The terms and effect of such an agreement would be precisely the same

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*An agreement among competitors to limit production is the functional equivalent of price fixing, and as such it is a *per se* violation of the Sherman Act. *See, e.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921); Report of the Attorney General's National Committee Studying the Antitrust Laws 12 (1955).

Such restraints on production have been frequently enjoined. *See, e.g., United States* v. *General Dynamics Corp.*, 1963 Trade Cas. 78,674 (S.D.N.Y.); *United States* v. *Standard Oil Co. of Calif.*, 1959 Trade Cas. 75,525 (S.D. Cal.); *United States* v. *United Fruit Co.*, 1958 Trade Cas. 73,794 (E.D. La.); *United States* v. *Chemical Specialties Co.*, 1958 Trade Cas. 74,634 (S.D.N.Y.); *United States* v. *Maine Lobstermen's Ass'n*, 1958 Trade Cas. 71,375 (D. Me.); *United States* v. *Shade Tobacco Growers Agricultural Ass'n*, 1954 Trade Cas. 69,413 (D. Conn.).

Similarly, an agreement among competitors to limit the terms of trade on which they will deal with their suppliers or customers is a group boycott and thus a *per se* violation of the Sherman Act. *See, e.g., Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914).

as that of the proposed decree. Indeed, the relevant provisions of the proposed NBC decree become operative only when, as and if CBS and ABC become bound by these same restraints.* In short, the Government proffers to the Court a system of restraints so pernicious as to be unlawful *per se* were the Government not a party to it.** But the Government's sponsorship of the agreement does not alter its effect, confer any blessing, or turn black into white. What is plainly unlawful under the Sherman Act is not "in the public interest" merely because the Government vouches for it. *United States* v. *Columbia Artists Management, Inc.*, 1963 Trade Cas. 78,796 (S.D.N.Y.), *reaffirmed*, 1964 Trade Cas. 79,265 (S.D.N.Y.), *aff'd per curiam*, 381 U.S. 348 (1965).

Since the principal provisions of the decree are of the type condemned as illegal *per se*, it is not surprising that an analysis of their economic impact confirms their anticompetitive nature.

1. The Production Limitation.

The decree (Section V) would severely limit the amount of television entertainment programming that may be produced by NBC, but it would not alter the demand for programming. Thus, like all restrictions on supply relative to demand, the effect of Section V would be to drive up price. But the effect of competition—and a principal objective of the Sherman Act—is to drive down price.† Moreover, by reducing

*Proposed Decree, Section VII.

**Cf. DEPARTMENT OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 212 (1977):

"Robinson-Patman reaches the goal of protecting more efficient competitors by pricing restrictions which, if agreed to by, say, an association of small businessmen and their suppliers, would be *per se* violations of the Sherman Act. Such agreements would both assure high prices to the sellers, particularly if they were oligopolists, and prevent competition for buyers."

†*See, e.g., Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4-5 (1958). In its recent REPORT ON THE ROBINSON-PATMAN ACT (1977), the Department of Justice stressed (at 64) the importance of "the antitrust goal of preserving hard bargaining to bring down non-competitive prices" and affirmed (at 211) that the "antitrust laws . . . have as their goal the enhancement of consumer welfare by promoting the maintenance of competitive markets and actual competition, primarily on price."

the alternative sources of supply available to meet the demand for television programming, Section V would blunt the spur of competition among producers seeking to sell programs. If the degree's limitation to two and a half hours of prime time entertainment programming per week were applied to MCA (which produces approximately 27.3% of NBC's requirements and approximately 21.4% of the three networks' requirements) rather than NBC (which produces approximately 4.5% of its own requirements and 1.6% of the three networks' requirements),* the anticompetitive impact would be more dramatic but no more real.**

The fact that NBC now produces only a small amount of programming by no means eliminates the anticompetitive significance of the proposed decree because, as the Government recognizes (CIS at 8), NBC is free, absent the decree, substantially to increase its level of production. Thus, even if NBC were not producing any programming, its presence as a potential competitor poised at the edge of the market, ready to enter if prices rise above a competitive level, constitutes a substantial incentive to vigorous competition among those already engaged in program production.† The Government itself has acknowledged that

> "potential competition (*i.e.*, the threat of entry, either through internal expansion or through acquisition and expansion of a small firm, by firms not already or only marginally in the market) may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition. . . ." Department of Justice, Merger Guidelines at 21-22 (1968).

*Fisher Affidavit, Ex. 3, at 58a-64a, *infra*.

**Fisher Affidavit at 3a, 6a-8a, *infra*; Posner Affidavit at 67a, *infra*.

†Fisher Affidavit at 9a, *infra*. As the Department of Justice noted with approval in its recent REPORT ON THE ROBINSON-PATMAN ACT (at 50), a "seller is particularly vulnerable to hard bargaining when he believes . . . that the buyer will produce the product himself by vertically integrating." In a nutshell, as the REPORT goes on to state (at 65): "The ability of firms to enter new markets is, of course, a key to keeping such markets competitive."

As the Supreme Court observed in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174 (1964):

> "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."

The production limits the Government would impose in Section V of the proposed decree eliminate the "substantial incentive to competition" which NBC's potential production capacity now represents.*

It must be noted, moreover, that the Government seeks to restrict not only NBC but also CBS and ABC as program suppliers.** Thus, the reduction in supply or potential supply being sought by the Government—and the anticompetitive effects that would flow from that reduction—are very considerable indeed.

Directly on point here are the decision of the Ninth Circuit Court of Appeals and the position taken as *amicus curiae* by the Government itself in *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), *rev'g* 348 F. Supp. 606, 348 F. Supp. 623 (C.D. Cal. 1972) and 353 F. Supp. 1219 (C.D. Cal. 1973). In that action, a manufacturer of automobile air conditioners charged that Volkswagen's acquisition of another air conditioner manufacturer violated Section 7 of the Clayton Act. The District Court (Real, J.) granted summary judgment for plaintiff and entered a decree requiring Volkswagen to divest the acquired company and enjoining Volkswagen (1) from manufacturing or assembling automobile air conditioners in the United States for a period of 10 years, (2) from importing Volkswagen automobiles with air conditioners installed for a period of 7 years, and (3) from purchasing more than 50% of Volkswagen's air conditioner requirements from the divested company.

*Vertical and conglomerate acquisitions and mergers have been struck down precisely because they forestall potential independent entry by internal expansion which is "the sort of entry into a new market which Congress intended to encourage". *Bendix Corp.*, 77 F.T.C. 731, 825 (1970), *rev'd on other grounds*, 450 F.2d 531 (6th Cir. 1971); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370 (1963). The elimination of such potential independent entry has regularly been held likely substantially to lessen competition. *See, e.g., United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972); *United States* v. *Penn-Olin Chemical Co., supra*; *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd*, 418 U.S. 906 (1974). The Government would presumably have raised precisely this argument had NBC's elimination as a potential market entrant resulted from a merger with MCA or another program supplier. Yet, the anticompetitive effect of its elimination by judicial decree is every bit as great.

**Proposed Decree, Section VII.

That decree was sharply criticized by Assistant Attorney General Donald I. Baker as "highly anticompetitive",* a criticism set forth expansively in the Government's *amicus* brief. While recognizing that some ancillary restraints on internal production might in some situations be necessary to insure the viability of the divested company, the Government said that "the additional injunctive provisions which the District Court adopted do not appear to be normal or natural remedies in a Section 7 case".** The Government went on to attack injunctive provisions that were virtually indistinguishable from the production limitation in the proposed NBC decree:

> "The provision prohibiting VWoA from manufacturing air conditioners for 10 years eliminates any competition which VWoA might provide if it entered the market during that period and also eliminates any procompetitive effect VWoA might have as a 'perceived' potential entrant. The limitation on VWoA purchases from the divested company deprives the divested Company of an incentive to attempt to capture more than half of VWoA's business and provides the other manufacturers with a perpetual guarantee of one-half of the business. The seven year restriction on importation by VWoA of automobiles with installed air conditioning not only creates a barrier to competition from foreign air conditioner manufacturers, but may also produce an effect upon competition within

Baker Outlines Priorities, Methods of Antitrust Enforcement, [1976] 787 ANTITRUST AND TRADE REG. REP. (BNA) AA-1, AA-5.

**Brief of the United States at 17.

the automobile market by inhibiting the development and sale of Volkswagen automobiles with factory installed air conditioning."*

The Court of Appeals reversed the District Court's holding that Volkswagen's acquisition violated Section 7 and then went on to comment on the injunctive provisions that might be proper in the event that illegality was established at trial on remand.** After pointing out that divestiture could not be ordered in a private Section 7 action, the Court of Appeals essentially adopted the criticisms expressed in the Government's *amicus* brief. It advised the District Court to reconsider the propriety of the import ban in view of "the unavailability of the divestiture remedy," "the anticompetitive effect of the ban with respect to competition for the sale of automobiles," and "the anticompetitive effect of the ban with respect to competition for the sale of automobile air conditioners." 532 F.2d at 693-94. As to enjoining internal production of air conditioners by Volkswagen, the Court of Appeals said:

> "Because divestiture is not an available remedy, there is scant basis for imposition of a ban on internal expansion on remand." *Id.* at 694.

Finally, with respect to the provision prohibiting Volkswagen from satisfying more than 50% of its air conditioner requirements from the divested company, the Court of Appeals observed:

*Brief of the United States at 18-19

**In remanding the case for trial, the Court of Appeals found that the District Court had erred in defining the product market as air conditioners sold for use in Volkswagens, because such a definition ignores "cross-elasticity" of supply—that is, whether manufacturers of air conditioners for Volkswagens "may with little modification of production facilities produce units for different makes of cars." 532 F.2d at 691. That is to say, while an air conditioner obviously cannot simply be slipped out of a Volkswagen and into a Chevrolet, the obstacles facing a manufacturer who wishes to make such a shift are not substantial, and thus manufacturers of air conditioners for different makes of cars are in competition with one another. Since thirty minutes of "All in the Family" could be played on ABC rather than CBS with no changes whatsoever, it is bizarre that the Government has here defined the market as "the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours", thus excluding programs supplied to CBS and ABC in large part by the same producers who supply NBC. *See* Fisher Affidavit at 2a, *infra;* Posner Affidavit at 73a-75a, *infra.*

> "... Cabletics argues that the 50% quota creates an open market for the competitors of the divested firm.
>
> "The 50% quota, however, creates the antithesis of an open market. As the district court inadvertently acknowledged, the effect of the quota is to displace the competitive forces of the marketplace and transform a segment of the automobile air-conditioning equipment business into a regulated industry. *See* 353 F. Supp. at 1223 ("The Court must therefore fashion some flexible standard by which the business needs of a buyer can be compatible with the needs of the various possible suppliers in this market.') It is inconceivable that such a quota would serve the goals of the antitrust laws, which are designed to preserve competition, not particular competitors." 532 F.2d at 694 (footnote omitted).

The restrictive provisions of Section V of the proposed NBC decree obviously cannot be supported as merely ancillary to divestiture. The proposed decree does not provide for divestiture and, indeed, there has been no acquisition to be divested. Hence, there is no possible justification for a restriction on NBC production in light of the anticompetitive impact of such a ban. Like the quota system imposed on Volkswagen by the District Court and rejected by the Ninth Circuit in *Cabletics*, the quota imposed by Section V on NBC, however attractive it may be to other program producers, "creates the antithesis of an open market" and cannot "serve the goals of the antitrust laws, which are designed to preserve competition, not particular competitors." It is incomprehensible how the Government, having persuaded the Ninth Circuit to denounce in *Cabletics* a quota system that "provide[d] the other manufacturers with a perpetual guarantee of one-half of [VWoA's] business",* can with a straight face here urge the Court to impose a system that would provide other program suppliers with a guarantee of approximately 90 per cent of NBC's business.

Nor was *Cabletics* a fluke. The same point was made by the Government in connection with the consent decree entered in *United States*

*Brief of the United States at 19.

v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975). In that action, the Government challenged Gillette's acquisition of Braun, a manufacturer of electric razors. The consent decree required Gillette to establish a new company holding all rights to manufacture and market the Braun electric shaver in the United States. Two other manufacturers of electric shavers, Ronson and Remington, objected to the fact that the proposed decree did not prohibit future entry into the electric shaving industry by Gillette utilizing technology acquired from Braun. In response, the Government conceded that such future entry by Gillette was not unlikely but urged that such potential entry was desirable:

> "We look upon such entry as being beneficial due to the resultant competition in the United States electric shaver market even though that entry is facilitated by the residual knowledge derived from [Braun's] past experience."*

The Government dismissed the objections of Ronson and Remington as apparently "mere directed at protecting their own market position than at protecting competiton",** and the court acknowledged the validity of the Government's position when entering the decree. 405 F. Supp. at 717.

Finally, it must be noted that the production limitation in the proposed decree is particularly inappropriate in light of the serious shortage over the years of at least one type of programming used by the television networks, namely theatrical feature films. Such films are produced largely by the producers of other types of television programming. When the Government sued the major studios twenty years ago for "block booking" their theatrical films to television, the head of the Antitrust Division, Victor R. Hansen, explained that shortage of film product had been a substantial problem since the earliest days of television.† A decade later, at the time of ABC's and CBS's entry into

*Plaintiff's Response to Comments regarding the Proposed Final Judgment against the Gillette Co., 40 Fed. Reg. 46,321, 46,325 (1975).

**Id.

†Address by Victor R. Hansen, prepared for delivery to the Federal Communications Bar Association, April 18, 1957, at 4-6. Indeed, Judge Hansen congratulated the networks for the "excellent job" they had done in producing more and more of their own programming in the face of this shortage. *Id.* at 5.

theatrical feature film production in 1967, the theater owners themselves (the other principal users of such product) said that they

> "vigorously applaud, approve and welcome the entry of [ABC, CBS and] all others into the field of production and distribution of feature motion pictures suitable for . . . theatres . . . in the sincere hope that the present and prospective critical shortage of available product will be eliminated."*

Three years later the theater owners found that the product shortage that existed in the 1967 "exists today in more aggravated and perilous circumstances for exhibition."**

In 1974, Judge Palmieri, in denying a motion by the major Hollywood studios to enjoin ABC from broadcasting ABC-produced theatrical motion pictures, found that

> ". . . feature film product has been for a number of years in a state of continuing and acute shortage leading to a substantial escalation of film licensing costs sustained by the television industry. Indeed, the extent of this increase can be gleaned from the fact that the average cost for a feature film license for network television exhibition in 1961 was $100,000.00 whereas it had risen by the end of 1967 to $800,000.00 or more. It was against this background of product shortage and greatly increased licensing costs, paid in substantial part to the plaintiffs, that ABC made its decision to produce theatrical feature films." *Columbia Pictures Industries, Inc.* v. *American Broadcasting Companies*, 1974-1 Trade Cas. 96,092, 96,094 (S.D.N.Y.), *aff'd*, 501 F. 2d 894 (2d Cir. 1974) (footnote omitted).

Nor has the problem abated in recent years. Only last month the *Wall Street Journal* reported that the Hollywood studios are slashing pro-

*Resolution of the Board of Directors of the National Association of Theatre Owners, adopted October 1967.

**Resolution of the Board of Directors of the National Association of Theatre Owners, adopted November 1970.

duction and thus causing the shortage of theatrical feature films to reach "crisis" proportions threatening the economic viability of exhibitors.* Given this situation, it is not surprising that theater owners are reported to be giving serious consideration to participating in feature film production and, indeed, to seeking modification of the 1950 *Paramount* decree that restrains certain of them from doing so.**

Restriction of production is antithetical to the objectives of the antitrust laws irrespective of the adequacy of supply. In view of the evidence of product shortage, however, the restriction on network production contemplated by the proposed decree, while perhaps a boon to the major studios in terms of higher prices and protection from competition, is completely irrational and cannot be held to be in the public interest.

2. The Restrictions on the Terms of Trade.

Just as the production limitation of Section V of the decree is patently anticompetitive, so too are the provisions of the decree that would alter and regulate the terms on which NBC may contract with program suppliers. For example, under the decree a producer may not, when selling to NBC the network broadcast right to the initial episodes of a series, also sell to NBC the right to repeat network showings in subsequent seasons of more than three of those episodes† or the right to carry a program for more than four years†† or the right to the exclusive broadcast use of a program throughout its network run.‡ As the Fisher Affidavit states (at 10a, *infra*), "such an alteration by fiat of the terms of trade between networks and program suppliers will not alter NBC's alleged status as a monopsonist [*i.e.*, a monopoly buyer] and indeed may well have the effect of further increasing concentration and

*"Film Exhibitors Face a Financial Crisis As Hollywood Studios Slash Production", Wall Street Journal, February 8, 1977, at 46; this article is annexed hereto as Appendix F, at 10*a*, *infra*.

**"Pinch Picture Playoff Patterns, Majors Can't Supply Full Year's Product", Variety, March 17, 1976, at 1, 34; "NATO, Distribs Link Arms Against Exhib Financing Ban", Hollywood Reporter, February 15, 1977, at 1, 9.

†Proposed Decree, Section VI(H).

††*Id.*, Section VI(E)(i).

‡*Id.*, Section VI(E)(ii)(a)-(c).

restricting competition" among program suppliers, the very competition the Government alleges that NBC has suppressed.

The proposed decree does not even purport to enhance the competition NBC faces as a buyer of programming. Such competition is generated by NBC's actual or potential *competitors* in the purchase of programming—*i.e.*, other *buyers*, including, particularly, CBS and ABC—but nothing in the decree affects NBC's relationships with CBS and ABC. Indeed, the Government specifically states that the decree is designed "to prevent [NBC] from being placed at a competitive disadvantage with respect to CBS or ABC" (CIS at 14). The Government's proposed alteration and regulation of the terms on which NBC may deal with its *suppliers* simply does not increase competition among the *buyers* of network programming.*

This is by no means to say that the provisions of the decree that effect this alteration are economically irrelevant. Indeed, a restriction on the rights that may be bought and sold might in itself be thought a restraint of trade. Obviously certain restraints of trade—such as an agreement to buy a barber shop only if the seller agrees not to open a new barber shop across the street—may be needed for the functioning of the market. But no such effects flow from this decree's restrictions; on the contrary, there may well be further harmful effects.

As Professor Fisher's detailed analysis demonstrates, the most likely harmful effect of these restrictions on the terms of trade between NBC and its suppliers will be to limit the ways in which the networks can compete** and to force producers to bear more of the risk of a program's failure.† While this may be of little or no consequence to major producers with ample resources, it is likely to have a highly adverse effect on small independent producers and potential

*Fisher Affidavit at 11a, *infra*.

***Id.* at 13a, *infra*. *E.g.*, the limitation on NBC's purchase of terms will restrict its future choices as to program scheduling—a major area of network competition.

†*Id.* at 14a, *infra*. Section VI(E)(i) of the decree, for example, would limit the renewal options NBC can purchase, thus preventing producers from selling "up front" to NBC options for later years of a program, and thereby preventing them from realizing at an early date the current value of those options.

producers without such resources. It is precisely these producers in whose emergence the networks have a vital interest. Tomorrow's Norman Lears and Quinn Martins are obviously not now before the Court and therefore cannot complain of the heightening of entry barriers which the decree will effect.* Conversely, the present suppliers with established track records are likely to enjoy the prospect of being shielded from new competition. Thus, it will hardly be surprising if the major studios and other successful producers urge that the decree should be still more restrictive; the higher the barriers to entry can be raised, the better for them.

Similarly, by prohibiting NBC from acquiring any rights or interests in programming other than the network broadcast right, the decree imposes risks on producers that some of them might well prefer to avoid. As stated in the Posner Affidavit:

> "The value of such rights tends to be highly uncertain; hence the effect of contracts that transfer these rights to the network is to have the network assume the risk that the program will not be successful enough to make the various secondary or residual rights in it commercially valuable. This shifting of risk from producer to network is a boon for the small producer, who may be in no position financially to assume the risks of failure involved in retaining all of the rights to subsequent exploitation of the program." Posner Affidavit at 66a, *infra*.

Thus, the restraint on network production together with the barriers to entry into production and the restrictions imposed on smaller producers all have the tendency to increase concentration in the hands of the major studios. As the Fisher Affidavit states:

> "Concentration resulting from the superior skill, foresight and industry of some competitors is one thing; concentration procured

*See *Times-Picayune* v. *United States*, 345 U.S. 594, 622 (1953): "Nor can we be certain that the challenged practice, though not destructive of existing competition, did not abort yet unborn competitors equally within the concern of the Sherman Act."

> by fiat is quite another; and concentration resulting directly from a decree ostensibly intended to enforce the antitrust law is simply absurd." Fisher Affidavit at 18a-19a, *infra*.

In a desire to provide producers with fair prices, the decree substitutes a complex system of regulation for competition. But the Sherman Act, unlike minimum wage law and crop price supports, is not concerned with assuring "reasonable" prices or protecting particular competitors. It is concerned with protecting competition.* As stated in the Posner Affidavit:

> "The entry of a regulatory decree is almost a sure sign that the case should never have been brought. The purpose of the antitrust laws is to promote free competition by dissolving restraints of trade and not, as in the proposed decree in this case, to supervise the details of bargaining between buyers and sellers." Posner Affidavit at 68a, *infra*.

And as Professor Fisher concludes:

> "The decree serves the Government's apparent purposes to the extent that it substitutes regulation for competition. But regulation seldom succeeds in achieving the same desirable allocation of resources that results under competition. Indeed, there are usually inherent economic inefficiencies in regulation, not the least of which are the costs, burdens and delays of administering the regulatory regime." Fisher Affidavit at 19a, *infra*.

*As the Department of Justice recently observed in criticising the Robinson-Patman Act as essentially a regulatory statute inconsistent with the purposes of the antitrust law: "The antitrust laws, as they are embodied in the bulk of the Sherman and Clayton Acts, have as their goal the enhancement of consumer welfare by promoting the maintenance of competitive markets and actual competition." On the other hand, "the regulation of price competition—direct and indirect—for the benefit of certain favored incumbents in an industry, . . . (along with entry regulation) characterizes the essence of economic regulation as it has developed in the American system." Such regulation, said the Department, "strikes at a process which is fundamental to a competitive market: the process by which each buyer negotiates for itself the best possible price". DEPARTMENT OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977) at 211, 213, 32.

It was for these reasons that Donald F. Turner, while Assistant Attorney General in charge of the Antitrust Division, cautioned that regulatory provisions in consent decrees "should be looked at with great care" and that regulatory decrees are ordinarily not "the proper business of antitrust."*

B. The Redundant Regulatory Scheme Set Out in the Proposed Decree Cannot Be in the Public Interest.

At the outset of this litigation this Court recognized that there was going to be a "real and substantial problem"** of accommodating any decree in this action with the FCC's regulatory scheme. Because of that "problem" the Court questioned whether it was necessary or appropriate to continue to prosecute the case, but concluded that was a decision which the Court had to leave to others. Despite that admonition, it is apparent from the proposed decree and the CIS that the problem of rationalizing the provisions of the decree with the FCC's regulations has not even been considered by the Department of Justice, let alone solved.

The proposed decree presents squarely to the Court precisely the "real and substantial problem" it anticipated three and a half years ago. Indeed, the proposed decree, embodying a highly complex, elaborate and obscure scheme of regulation, makes it apparent that the problem is even more substantial than might have been anticipated. At the same time, the principal reasons advanced for proceeding with the litigation have clearly evaporated. In denying defendants' motions based on the primary jurisdiction of the FCC, the Court in reliance on arguments made by the Department emphasized that "the FCC is not empowered to adjudicate alleged antitrust violations" and that the FCC's regulations "provide for future conduct, they do not determine the propriety of past conduct". *Id.* But, the proposed decree now

An Interview With the Honorable Donald F. Turner, 30 ANTITRUST L. J. 100, 108 (1966).

***United States v. National Broadcasting Co.*, 1974 Trade Cas. 95,987, 95,992 (C.D. Cal. 1973).

before the Court neither "adjudicates alleged antitrust violations" nor determines "the propriety of past conduct". It is purely a complex system of regulation concerning future conduct to be administered by this Court.

The regulatory scheme which the proposed decree would have this Court administer cannot be in the public interest because it would impose a system of regulation that duplicates, overlaps and collides with the FCC's pervasive regulatory regime. As this Court recently found:

> "The breadth and detail of these [FCC] regulations compel the conclusion that the regulatory scheme adopted by the FCC to deal with the problems uncovered by its investigation of the television programming market can be considered nothing less than 'pervasive.' The regulations also provide ample evidence of the fact that the FCC has been active in exercising its regulatory powers with respect to the subject matter of this suit." *United States v. CBS Inc.*, Civ. No. 74-3599-RJK, slip op. at 9 (C.D. Cal., Feb. 16, 1977) (footnotes omitted).

In light of that pervasive regulatory scheme, the Court took note "of the substantial likelihood that imposition of the remedies requested by the government in this action may conflict with the directives of the FCC's regulations, thereby subjecting the networks to varying standards of conduct" and that "maintenance of this action could possibly disrupt the FCC's regulatory efforts". *Id.* at 9-10.

However substantial the problem of accommodating the decree in this litigation with the existing body of FCC regulations, more intractable still is the problem of accommodating what will emerge from the FCC's major new inquiry into network practices announced on January 14, 1977 ("Network Practices Inquiry").* The FCC's Notice of Inquiry explicitly announces the Commission's intent to deal

In re Commercial Television Network Practices and the Ability of Station Licensees To Serve the Public Interest, Notice of Inquiry, Docket No. 21049, 42 Fed. Reg. 4992 (1977). (A copy of the Notice is annexed hereto as Appendix C at pp. 86a-104a, *infra*.)

with each of the areas covered by the proposed decree. The Notice anticipates that "a report concluding the inquiry can be completed within one year following receipt of the comments" to be submitted by June 1. *Id.* at 102a, *infra.*

In the meanwhile:

How can this Court be expected to rationalize the provisions of the proposed decree with regulations which are not only subject to change but not yet even written?

Why should this Court be required to determine, without benefit of an evidentiary record before it, whether the regulations in the proposed decree are in the public interest when the FCC has assembled a "special staff composed of economists, attorneys and others with relevant experience and expertise" and has called for comments by industry members and the general public preparatory to reviewing that very question? *Id.* at 102a, *infra.*

At best the two determinations will be duplicative, and at worst they will be totally inconsistent and will require major revisions by one or both of the tribunals addressing the question. In sum, a comparison of the proposed decree and the Network Practices Inquiry makes it obvious that there is a total redundancy between what this Court is being asked to do and what the FCC is about to do, and that overlap cannot be in the public interest. Nor can the Department still urge that it is necessary for the Court to proceed to an antitrust adjudication unobtainable from the FCC; the proposed decree involves no such adjudication.

We do not seek to reargue here the jurisdictional motions which have been fully briefed earlier in this litigation. We continue to believe that those motions were sound, although we certainly concur in the Court's view that the issues involved are "problematic" and that the Supreme Court could well shed more light on them. We confine our argument here to a showing that the proposed decree does not meet the public interest standard of the APPA (1) because the decree is essentially regulatory and would require this Court to supervise the television industry for at least the next fifteen years and perhaps in perpetuity; (2) because it overlaps and conflicts with current FCC regulations; and

(3) because an assessment of the public interest with respect to every matter covered by the proposed decree has been undertaken in the new FCC Network Practices Inquiry. Finally we urge that if the Court is not disposed to reject the proposed decree now, it should at least stay decision until the FCC has completed its inquiry in order to minimize the conflict and duplication between that inquiry and this proceeding.

1. The Decree Will Require Continuous Judicial Supervision of the Television Industry.

The Department expressly concedes the "regulatory nature" of the decree (CIS at 9). It is important to consider precisely what that means. It means that the decree will have a substantial effect on every phase of program procurement and distribution, including production, production facilities, pilots, stripping, spin-offs, and other broadcast and non-broadcast uses of entertainment programs. It means that the Court will be beset with requests for interpretations and modifications of the decree, exemptions from its requirements, and the like.* Virtually every contract and program production will entail some question of application or interpretation under the exceedingly broad and singularly obscure provisions of the decree that will ultimately have to be settled by the Court. In short the Court will be forced to oversee all the business relationships in this industry for 15 years or more.**

The practical significance of such judicial oversight is illustrated by the work of the courts in administering similarly broad "regulatory" consent decrees with respect to music performance rights for the past 35 years in *ASCAP* and with respect to motion picture production and distribution arrangements for the past 28 years in *Paramount.* The *ASCAP* decree was entered in 1941.† It has been amended a number of times since then, including seven times since 1960. The

*Under Section XII of the proposed decree, the Court would retain jurisdiction to entertain applications "at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions" of the decree.

**Portions of the decree are to remain in effect for ten years, others for 15 years, and others in perpetuity.

†*United States* v. *ASCAP*, 1940-43 Trade Cas. 402 (S.D.N.Y. 1941).

court has been called upon to resolve disputes arising under the decree on a nearly continuous basis. Since 1962, for example, there have been more than 60 hearings involving the decree (an average of about four per year) and at least 40 reported decisions. The Department of Justice surely understated the matter when it acknowledged that the *ASCAP* decree has imposed a "heavy burden" on the judiciary.*

Similarly, in the last 28 years under consent decrees in *United States* v. *Paramount Pictures, Inc.*, 1948-49 Trade Cas. 63,009 (S.D.N.Y. 1949), the District Court has been involved in a gargantuan regulatory effort. Proceedings under the decrees have been so numerous that the docket sheet alone extends for more than 200 pages. Over 600 motions, applications and petitions (on the average of more than 20 a year) have been brought seeking modification, interpretation or implementation of the decrees, and requiring hearings on over 250 days and resulting in more than 50 reported judicial decisions.

However great the regulatory labors of the courts in those actions, neither of the industries involved was subject to the additional problems created by the concurrent regulation by an independent administrative agency—much less an agency which like the FCC has been "active in exercising its regulatory powers with respect to the subject matter" of the proposed decree. *United States* v. *CBS Inc.*, *supra*, slip op. at 9.

2. The Proposed Decree Overlaps and Conflicts with Current FCC Regulations.

Even apart from the FCC's new Network Practices Inquiry, which explicitly addresses itself to all the substantive provisions of the proposed decree, the subject matter of most of the substantive provisions in the proposed decree is covered either by existing FCC regulations or by pending FCC proceedings.** Perhaps the simplest illustration of unnecessary duplication (and the potential for conflict)

*Memorandum for the United States, dated January 24, 1974, at 8, *United States* v. *ASCAP*, Civ. No 13-95 (S.D.N.Y.).

**Attached as Appendix E (at 100a, *infra*) is a checklist of the matters covered in the proposed decree and their treatment by the FCC.

is where the provisions of the proposed decree track, virtually word for word, the language of the FCC's regulations. Thus, the provisions of Section IV of the proposed decree are drawn almost *in haec verba* from the FCC's syndication and financial interest rules.* So long as this identity prevails, perhaps the most that can be said for the decree is that it is totally pointless. There are, however, minor (and perhaps unintended) differences in wording and in context which will immediately suggest differences in interpretation as deals are struck and contracts are drafted with both sets of regulations in mind.

*With regard to financial interest, Section IV of the proposed decree provides that:

"NBC is enjoined and restrained from:

"(A) Acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by an independent program supplier, other than the right to the Network Exhibition of the program, except as provided in Sections VIII(A)-(D) of this Final Judgment, *provided that* an agreement granting NBC the right to Network Exhibition may include provisions concerning subject matters incident to the licensing and use of network programs. . . ."

The FCC's financial interest rule provides, in relevant part, that:

". . . no television network shall:

". . . acquire any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network. . . ." 47 C.F.R. § 73.658(j)(ii) (1976).

On syndication, Section IV enjoins NBC from:

"(B) selling, licensing, or distributing entertainment programs to television broadcast stations for non-network television exhibition (or otherwise engaging in the business commonly known as 'syndication'), or to foreign television stations or networks, except as provided in Section VIII(D) of this Final Judgment."

The parallel FCC rule provides:

". . . no television network shall:

". . . sell, license or distribute television programs to television station licensees within the United States for nonnetwork television exhibition or otherwise engage in the business commonly known as 'syndication' within the United States; or sell, license, or distribute television programs of which it is not the sole producer for exhibition outside the United States . . ." 47 C.F.R. § 73.658(j)(i) (1976).

Furthermore, when the two tribunals—the Court and the FCC (and the separate appellate processes to which they are subject)—are called upon to construe the decree and the regulations, it would border on the miraculous for them consistently to arrive at the same interpretation.

But the problem is much more serious than the likelihood that two tribunals will reach divergent interpretations. The Department's CIS declares that Section IV of the decree was intended to "permanently preserve the prohibitions in the FCC's financial interest and syndication rules" (CIS at 8). But the FCC did not intend to have its avowedly experimental regulations "permanently preserved". It intended to reconsider them from time to time in light of experience. Indeed, on January 14 the FCC announced its intention to review the continuing desirability of those regulations in its new Network Practices Inquiry. The Notice of Inquiry states:

> "The proposed NBC consent decree contains terms prohibiting NBC from acquiring distribution rights or profit shares in programs produced by outside producers, and from engaging in syndication of such programs anywhere, and from all syndication in the U.S. These particular terms appear virtually identical to rules adopted by the Commission in 1970 (§ 73.658(j)), prohibiting such activities, including the acquisition of any interest in a program produced by an outside party beyond the right to network exhibition. We invite interested parties to comment on the adequacy of our present rules and to propose alternatives if that appears to be warranted." Network Practices Inquiry, Notice at 98a-99a, *infra*.

Thus, it would appear that the proposed consent decree is designed as a preemptive strike by the Department of Justice on the FCC, intended to forestall the FCC from effectively reconsidering its own regulations. There is no conceivable reason why this Court should be required to participate in such bureaucratic infighting between two government agencies or why the cost of such an intramural struggle

should be visited on the broadcast industry. Nor is there any conceivable reason why this Court should be required to determine without the benefit of any evidentiary record that the perpetuation of those rules is in the public interest when the FCC has just assembled "a special staff composed of economists, attorneys and others with relevant experience and expertise" and called for comments by industry members and the general public to decide that very question. *Id.* at 102a, *infra*.

The utter irrationality of the Department's position becomes apparent when one notes that another portion of the CIS states:

> "Because of the regulatory nature of many of the injunctions in Section VI, and the possibility of changes in the industry, the Department has determined that the prohibitions should contain the time limitations spelled out in this section (15 years for subsections (B), (C) and (E) and 10 years in subsections (D), (F), (G) and (H))." CIS at 9.

No explanation is given (and none can be imagined) why the Department's proposed regulations in Section VI of the decree should be temporary in light of their "regulatory nature" and "the possibility of changes in the industry", whereas the FCC's regulations, applicable to the same industry and equally regulatory, must be "permanently preserved" in Section IV, even though the FCC wishes to reconsider them.

These examples of irrational duplication and conflict are only the tip of the iceberg. The FCC also has been actively regulating the matters covered by other significant provisions of the decree, including those dealing with exclusivity and pilots. With respect to exclusivity, the FCC has adopted a complex set of rules which regulate the use that pay cable may make of feature films being used on conventional television.* That is the same subject covered by Section VI(E)(iii) of the decree, which would regulate network acquisition of exclusive rights to feature films as against pay or subscription television. In addition, the FCC has instituted a new proceeding to conduct an "in-depth exploration" of exclusivity provisions (as between broadcast and cable

*47 C.F.R. § 76.225(a) (1976); *see* First Report and Order, Docket Nos. 18873 and 19554, 52 F.C.C. 2d 1 (1975).

television) "which give one form of television service exclusive use of program material vis-a-vis the other. . . ."* That proceeding is ongoing and is likely to deal with many of the same matters to which the exclusivity provisions in the decree (Section VI(E) (ii) and (iii)) are addressed. With respect to alleged "warehousing" by networks of program pilots, the FCC has adopted a rule that is similar, though not identical, to the prohibition in Section VI(F) of the decree.**

Another example of the conflict is provided by the FCC's lifting of the ban on pay cable use of program series. *See* Second Report and Order, FCC Docket No. 19554, 35 R.R.2d 767, 770 (1975). Those who had opposed that action had argued that producers of entertainment series would switch their programs to pay cable. The FCC found that because network-producer contracts generally provide for extended option periods, such an exodus was unlikely to occur. The FCC concluded that the rule would not unduly disrupt broadcast television operations and that it was therefore in the public interest. *Id.* at 772. In the proposed decree (Section VI(E)), the Department now seeks to limit the contract option provisions upon which the FCC relied. The successful operation of the FCC rule might be jeopardized if the proposed decree is entered.

The proposed decree also adopts relief which the FCC has previously considered and rejected. The proposed decree would limit NBC's production of prime time entertainment programming to 2½ hours per week (Section V) or approximately 10% of its schedule. Such relief is necessary, according to the Government, because of the networks' predisposition to use their own programming thus foreclosing outside suppliers of programs (CIS at 8). The FCC previously considered that same contention in connection with the proposed "50/50" rule which would have had the effect of limiting network program

*Notice of Inquiry, FCC Docket No. 20102, 52 F.C.C. 2d 87, 88 (1975).

**47 C.F.R. § 73.658(j)(ii) (1976). The FCC rule requires that if a network does not avail itself in timely fashion of its license to network exhibition of a program, the licensor may repurchase the program by reasonably compensating the network. The decree would prohibit NBC from keeping more than 35 percent of its pilot inventory for more than six months and would require that it sell the remainder at prices representing NBC's unrecouped costs.

production in prime time to 50% of its schedule.* However the FCC declined to adopt even a 50% limitation when it adopted instead the prime-time access rule which intentionally draws no distinction between programs produced by the networks and those obtained by them from independent producers and applies by its terms only to stations in the top 50 markets.**

The FCC has thus considered and rejected as not in the public interest a restriction on production much less stringent than the restriction in the proposed decree, adopting instead an alternative means of dealing with the same problem. The production limitation in the proposed decree would conflict with that public interest determination. Furthermore, the FCC has repeatedly amended that alternative (the prime-time access rule) and has expressly left the rule subject to future review in the light of experience. *Id.* at 384, 401. There is, therefore, not only current conflict but the potential for additional conflict should the FCC decide to modify the prime-time access rule in the future or to adopt some other solution.

Finally, it should be noted that all of the FCC's work in this area has been guided by its perception that the public interest requires that the networks assume responsibility for their program offerings and not operate merely as common carriers of other people's programming. Indeed, the networks have been repeatedly urged by the FCC, Congress and the public to be vigilant in exercising their responsibility for programming. The provision in the decree limiting the network's program production seriously curtails the network's capacity to meet that responsibility.

As the foregoing makes clear, there were ample grounds for the Court's recent finding that there is a "substantial likelihood that impo-

*Report and Order, Docket No. 12782, 23 F.C.C.2d 382, 384 (1970).

***Id.* As this Court noted in its exclusive jurisdiction opinion:

". . . [T]hese regulations were promulgated for the express purpose of fostering free competition in the television program market and clearly reflect the Commission's efforts to change many, if not all the practices challenged by the government in this antitrust action." *United States v. CBS Inc., supra*, slip op. at 8-9.

sition of the remedies requested by the Government in this action may conflict with the directives of the FCC's regulations" and "that maintenance of this action could possibly disrupt the FCC's regulatory efforts". *United States* v. *CBS Inc., supra,* slip op. at 9-10. Whatever one thinks of the desirability or wisdom of this mass of FCC regulations, surely the only sound way either to modify, repeal or perpetuate them is by proceeding before the FCC, or by obtaining judicial review of the FCC's actions, and not by the ambush of collateral attack. The inappropriateness of such a collateral attack is particularly apparent in light of the Court's observation that: "The FCC has demonstrated its attentiveness to the problems of competition in the prime time television program market and has taken steps, within its statutory powers, to see that the public interest is served. The Commission's obligation to regulate for the public interest can, and should offer sufficient assurance that antitrust policy and concerns will be considered in the course of regulating the telecommunications industry." *United States* v. *CBS Inc., supra,* slip op. at 13-14.

3. The FCC's New Network Practices Inquiry Is Explicitly Addressed to All the Matters Covered by the Proposed Decree.

However difficult the problems noted above of accommodating the proposed decree with rules that are extant, the problems of accommodation created by the FCC's new Network Practices Inquiry are still greater. According to the FCC, this broad inquiry into "television network practices and policies regarding the acquisition and distribution of television programming" was prompted in part "by allegations contained in antitrust complaints" in this action and the two companion cases. Network Practices Inquiry, Notice* at 87a, *infra.* The FCC recognized that its inquiry and the judicial proceeding will be "concurrently examining similar issues. . . ." *Id.* at 88a, *infra.*

The matters covered by the FCC inquiry and the proposed consent decree are not only similar, they are virtually identical. Indeed, the FCC inquiry—which will embrace, *inter alia,* network syndication, network program production, program contract options and exclusivity provisions, use of network production facilities, and network program reruns—is designed to consider the same factors of competition addressed by the antitrust court, as well as the need, if any, for *every* substantive provision in the proposed consent decree.** For example, the CIS asserts the decree would place "specific outer limits" on network program production in order to reduce NBC's ability to make use of its alleged power over program sources (CIS at 7). But the FCC has directed its inquiry at that very issue: whether the networks have such power; if so, whether they have an "anticompetitive advantage over potential competitors", and how that advantage, if it exists, affects the supply of independently produced programs. Network Practices Inquiry, Notice at 99a, *infra.*

The Department of Justice appears now to admit some concern that this latest FCC proceeding, which the Department generally supports, will create problems for this Court and, accordingly, it urged that the FCC not consider the issues raised by the litigation. Thus, while the Department initially filed comments with the FCC urging that it conduct a "comprehensive inquiry into network television"†—just as it has urged this Court to conduct "a complete inquiry into this industry"‡—the Department subsequently filed a letter with the FCC

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*Section IV of the proposed decree, concerning syndication and financial interests, is covered by paragraphs 21 and 22 of the Notice of Inquiry; Sections V and VI(D) of the proposed decree, concerning network program production, are covered in paragraph 23 of the Notice; Sections VI(B) and (C) of the proposed decree, concerning production facilities, are covered by paragraph 24 of the Notice; Section VI(E)(i) of the proposed decree, concerning program options, is covered by paragraph 25 of the Notice; Sections VI(E)(ii) and (iii), (F), (G) and (H), concerning network exclusivity of program series and feature films, pilots, episodes and reruns, are covered by paragraphs 26 and 27 of the Notice. *See also* the chart attached as Appendix E which lists FCC treatment of the items of relief in the proposed decree. As this Court has noted "The powers of the Commission to regulate the radio and television industries are unquestionably broad and flexible" and that "regulatory scheme is broad enough to comprehend the subject matter of this litigation." *United States* v. *CBS Inc., supra,* slip op. at 5-6.

**Comments of the United States Department of Justice, pp. 2, 4, Network Practices Inquiry, FCC File RM-2709 (filed November 23, 1976).

†Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 25.

urging that the FCC not inquire into the issues of competition in program supply involved in these cases. That letter stated:

> "While we continue to believe that a general inquiry by the Commission into network practices is appropriate and fully warranted at this time, we wish to emphasize that the Department's comments should not be considered as suggesting that the inquiry encompass those issues now being litigated in the Federal District Court in California."*

But the FCC has flatly rejected such a limitation. It has decided instead to consider the same competitive issues and the wisdom of the same types of regulatory provisions sought in the proposed decree, and thus has reaffirmed its intention actively to exercise its jurisdiction to impose whatever prospective rules are necessary to improve competition in connection with the matters that are the subject of these cases. To be sure, the FCC has also expressed its view that its inquiry should not preclude the Department from prosecuting these cases or seeking consent decrees. Network Practices Inquiry, Notice at 88a, *infra*. But the FCC has emphasized its own intention to review the competitive issues, and to decide whether or not to order the same or different remedial measures. Thus, whatever the FCC's views on the pending antitrust cases against the networks, it now appears inevitable that the proposed decree will either duplicate or conflict with the regulatory orders of the FCC and with the FCC's assessment of the public interest.

It is clear from its Notice of Inquiry that the FCC believes that a further careful study of each of the issues covered by the proposed decree is warranted, thus virtually ensuring that this Court would have to revisit the decree when the FCC's investigation and study are completed next year. Therefore, even if the redundancy and conflict inherent in the two regulatory schemes does not persuade this Court that it should now disapprove the proposed decree as not in the public interest, the Court should, at the very least, postpone consideration of

*Letter from Donald I. Baker, Assistant Attorney General for the Antitrust Division, to FCC Chairman Richard E. Wiley, p. 1, December 3, 1976. A copy of this letter is annexed hereto as Appendix D.

the proposed decree until completion of the FCC's current inquiry in order to enhance the possibility of an accommodation, to mitigate the inevitable conflicts and to reduce the danger of divergent views of the public interest.* As the Ninth Circuit Court of Appeals said in *Chronicle Publishing Co.* v. *National Broadcasting Co.*, 294 F.2d 744, 747 (9th Cir. 1961), in upholding a stay of an antitrust action pending an FCC review:

> "We are then confronted with the prospect of two tremendously complex proceedings simultaneously assembling the same factual data in painstaking detail for the purpose of considering these facts from different points of view. The situation is one which cries out for the elimination of wasteful duplication of effort. If the mechanics of justice are not to be wholly overwhelmed by the steadily increasing burden of complex antitrust litigation, means must be found for easing that burden. The elimination of unnecessary duplication does not appear unreasonable under these circumstances."

C. The Proposed Decree Conflicts with the Paramount Public Interest in Freedom of Speech.

The proposed decree is not in the public interest because the program production limitation seriously impairs the freedom of speech protected by the First Amendment.

It is beyond dispute that the television networks have First Amendment rights, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Rosenbloom* v. *Metromedia, Inc.*, 415 F.2d 892, 895 (3rd Cir. 1969), *aff'd*, 403 U.S. 29 (1971), and that entertainment programming is a form of speech protected by the First Amendment, *Schacht* v. *United States*, 398 U.S. 58, 63 (1970); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952). As the Supreme Court wrote in *Winters* v. *New York*, 333 U.S. 507, 510

*Cf. *United States* v. *American Telephone & Telegraph Co.*, 39 R.R.2d 203, 209 (D.D.C., Nov. 24, 1976). While Judge Waddy declined to refer the early proceedings in that case to the FCC, he nevertheless expressly noted that certain matters might be referred to the Commission later in the case, after the issues were "more sharply defined".

(1948): "What is one man's amusement, teaches another's doctrine." Nor does speech lose its constitutional protection because it is undertaken for profit. This fact is, in the words of the Supreme Court, "as immaterial in this connection as is the fact that newspapers and books are sold". *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964). *See Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

The proposed decree represents a gag which was avowedly designed to curtail the network's capacity to engage in a form of protected speech. It constitutes, therefore, a species of prior restraint —the very core of the evil to which the First Amendment was addressed. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Lovell* v. *Griffin*, 303 U.S. 444, 451-52 (1938); *Near* v. *Minnesota*, 283 U.S. 697, 713 (1931). The fact that the proposed ban on NBC production is less than total does not alter the fact that the proposed decree explicitly "abridges" freedom of speech. The decisions striking down prior restraints have seldom if ever involved total bans; most have involved abridgments that were much more limited. Indeed, in protecting freedom of speech, the courts have held invalid not only express prohibitions but also much more subtle forms of restraint.* Similarly, the fact that the decree would leave the network free to produce news, sports and public affairs programming does not legitimatize the serious restraint that it does impose on a significant and protected category of speech. A decree prohibiting Doubleday from publishing novels and poetry would not be rescued from constitutional infirmity because it permitted the publication of history and biography. *See Schneider* v. *New Jersey*, 308 U.S. 147, 163 (1939).

**E.g., Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) (chilling effect on First Amendment rights of threatened prosecution under statute purporting to regulate expression justifies injunctive relief by federal court); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (award of damages to a public official for defamation, absent proof of actual malice, violates the First Amendment); *NAACP* v. *Button*, 371 U.S. 415 (1963) (law prohibiting NAACP from assisting in litigation voided as infringing First Amendment rights); *NAACP* v. *Alabama*, 357 U.S. 449 (1958) (order compelling NAACP to list organization's members violated members' constitutional right of association).

Nor is it relevant that NBC would remain free under the decree to broadcast programs produced by others. A broadcaster's rights, protected by the First Amendment, include the right to speak for itself, and not merely to transmit the speech of others. A speaker has a right "to advance its own . . . views", *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 117 (1973), and to be "more than a passive receptacle or conduit" for the views of others, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974). As is plain from *Tornillo*, a newspaper cannot be required to carry a letters-to-the-editor column. *A fortiori*, a newspaper could not be prohibited from carrying more than two columns a day of articles by its own reporters, even though it was left free to fill the balance of each issue with material from syndicated columnists and wire services. Yet that is in substance precisely what Section V of the proposed decree does.*

Finally, we are not making any claim that the First Amendment immunizes broadcasters or anyone else from liability under the Sherman Act. We are concerned here only with the particular provisions of an ostensibly remedial decree. The Supreme Court and other courts have repeatedly recognized that, even where liability has been clearly established by an evidentiary record, injunctions must be carefully

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*By limiting the amount of entertainment programming which the network may produce itself, the proposed decree would compel the network to fill its remaining programming needs from independent program suppliers. But if, under the Supreme Court's decision in *Democratic National Committee*, a network cannot be compelled to *sell* advertising time, neither can it be compelled to *buy* someone else's programming.

It should be noted that, beyond the proscription of the First Amendment, Congress has provided in the Communications Act that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier". 47 U.S.C. § 153 (h). *See also* 47 U.S.C. § 326. Indeed, the Communications Act, 47 U.S.C. §§ 151 *et seq.*, and the regulations issued by the FCC thereunder, *see* 47 C.F.R. §§ 73.658 (d) (e), impose on broadcasters an affirmative obligation to exercise independent judgment in determining what to broadcast. Thus, broadcasters have not only a right but a duty to broadcast those programs—and only those programs—that they independently believe should be broadcast. The decree clearly conflicts with that right and that duty. What is NBC to do if it is dissatisfied with the programs offered to it by other program producers? The decree bars NBC from broadcasting what it believes should be broadcast, when it cannot get what it wants from others.

framed to avoid intrusion upon rights protected by the paramount dictates of the First Amendment. Thus, in *Associated Press* v. *United States*, 326 U.S. 1 (1945), in sustaining an injunction prohibiting an association of publishers from excluding other publishers from membership, the Supreme Court was careful to point out that the decree involved had no effect whatsoever on the First Amendment activities of the association:

> "The decree does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published. It only provides that after their 'reason' has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication." 326 U.S. at 20 n. 18.

And in *United States* v. *Lorain Journal Co.*, 92 F. Supp. 794 (N.D. Ohio 1950), *aff'd*, 342 U.S. 143 (1951), the district court wrote:

> "There is no appeal to any Court more apt to strike a responsive chord than an appeal to rights guaranteed by the First Amendment and under no consideration would this Court reach the conclusions here expressed were they instrumental in undermining or even affecting a free press. In the balance of our constitutional scheme the importance of the First Amendment may be such that sanctions consonant with the Commerce Clause, art. 1, § 8, cl. 3, and clearly applicable to other enterprises cannot be used against a newspaper." 92 F. Supp. at 800.

By contrast, in *Sun Publishing Co.* v. *Walling*, 140 F.2d 445 (6th Cir.), *cert. denied*, 322 U.S. 728 (1944), where the district court had enjoined delivery or transport of newspapers that had been published by an employer who violated the Fair Labor Standards Act, the court of appeals found the injunction constitutionally impermissible because it amounted to "suppression and injunction which is a restraint upon publication. *Near* v. *State of Minnesota, supra*," 140 F.2d at 450.

Like the decree reversed in *Sun Publishing*, the proposed NBC decree entails "suppression and injunction". The Government is asking the Court to find that an enforceable judicial decree restraining freedom of speech is in the *public* interest. Given the paramount expression of the public interest set forth in the Constitution, such a finding cannot be made here.

II.

THE GOVERNMENT'S COMPETITIVE IMPACT STATEMENT FAILS TO SATISFY THE REQUIREMENTS OF THE ANTITRUST PROCEDURES AND PENALTIES ACT.

The Antitrust Procedures and Penalties Act* constituted a major reform of the procedures and conditions for entry of antitrust consent decrees. The Act was designed to help restore public confidence in the enforcement of the nation's antitrust laws by providing the court and the public with a full assessment of a proposed decree's anticipated effects on competition as well as the circumstances under which the decree was negotiated. In the words of the bill's sponsor, Senator Tunney:

> "It is more sunlight that we are seeking to shed on the methods and manner by which we settle complex and costly antitrust suits through the consent decree process.**

The principal tool for illuminating the consent decree process is the "competitive impact statement" which the APPA requires the Department of Justice to file with the court and publish in the Federal Register when the proposed decree is filed. The CIS must not only state the "nature and purpose" of the case but also describe the "practices or events" giving rise to the alleged antitrust violation

*15 U.S.C. § 16(b)-(h).
**119 Cong. Rec. 24599 (1973).

and must then explain "the anticipated effects on competition" of the proposed relief.* Congress clearly intended the competitive impact statement to be similar in function to the "environmental impact statement" required under the National Environmental Protection Act.**

*The act provides that:

". . . Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, *and the anticipated effects on competition of such relief;*

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

"(5) a description of the procedures available for modification of such proposal; and

"(6) a description and evaluation of alternatives to such proposal actually considered by the United States." 15 U.S.C. § 16(b) (emphasis added).

**42 U.S.C. §§ 4321 *et seq.*, 4332 (2)(c). *See* remarks of Senator Tunney and Senator Gurney, 119 CONG. REC. 24599, 24600 (1973). Again to quote Senator Tunney:

"The public impact statement, perhaps the most novel feature of the bill, is similar to the environmental impact statement presently called for under the National Environmental Protection Act. It is, therefore, not without precedent, but rather reflects a continuing concern on the part of Congress to assure that decisions having a major public impact be arrived at through procedures which take account of that impact." 119 CONG. REC. 24599 (1973).

As litigation under the analogous provision of NEPA has made clear, an impact statement is inadequate if it consists of conclusions unsupported by facts or fails to disclose and evaluate fully both the negative as well as the positive impact of the proposed action. *See, e.g., Silva* v. *Lynn*, 482 F.2d 1282 (1st Cir. 1973); *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F.2d 693 (2d Cir. 1972); *Chelsea Neighborhood Associations* v. *United States Postal Service*, 389 F. Supp. 1171, 1184 (S.D.N.Y. 1975), *aff'd*, 516 F.2d 378 (2d Cir. 1975).

Congress left no doubt that the "impact" with which it was primarily concerned is the impact on competition. As the House Judiciary Committee wrote:

"Wherever appearing in the bill, your Committee has substituted the word, 'competitive' for the word, 'public' in the phrase, 'public impact statement' because: (a) the antitrust laws protect and promote competition; (b) the expertise the Antitrust Division is charged by the Congress with institutionalizing focuses on 'competitive' effects; (c) ambiguities arising from the usage of 'public impact' in environmental case law and statutes are foreclosed; (d) current proposals for inflationary 'impact statements' might otherwise be thought to be adopted which they are not except to the extent that the analysis of or the prediction of competitive effects in antitrust law traditionally entail inflationary considerations; and (e) the substitutions refine and emphasize legislative purposes and guidelines for the contents of the 'impact statement' mandated by the bill."*

Thus, the essential purpose of a CIS is to explain the competitive effects, both positive and negative, that the proposed decree may have.

A. The CIS Fails To Explain the Impact of the Proposed Decree on Competition.

We have discussed above the respects in which the proposed decree is anticompetitive.** Even if that discussion were less conclusive than we believe it to be, the points we have raised are obviously not so inconsequential that they can be ignored. Yet the CIS ignores them completely.*** It contains no discussion of the proposition that eliminating a supplier or potential supplier is inherently anticompetitive, even though the Government has frequently asserted that proposition in the past, and

*H.R. REP. No. 1463, 93d Cong., 2d Sess. 12 (1974).

***See* pp. 2-17, *supra*.

***This is particularly surprising inasmuch as before the proposed decree and CIS were filed, we fully described the anticompetitive effects of the proposed decree to the Department of Justice.

there is no attempt to rationalize the provisions of the decree with the prior conflicting statements of antitrust policy by the Government. Nor is there any discussion of the prospect that the shifting of risks, resulting from the decree's restrictions on the rights that may be bought and sold, will lead to increased concentration and restriction of competition among program suppliers. Whether right or wrong, these points are clearly not frivolous. Failing even to allude to them is inherently deceptive.* Indeed, the CIS is subject to all of the criticisms that the Government, in its *amicus* brief in *Calmetics*, heaped on Judge Real for his failure to analyze the economic significance of the decree entered and later vacated in that action.**

In so far as the Government says anything about the competitive impact of excluding a competitor, it engages not in discussion but in mere *ipse dixit*:

> "[The production limitation] would enhance competition in television entertainment program production and exhibition by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers". CIS at 8.

In plain and simple terms, this statement says that competition will be enhanced by eliminating a competitor, and that is arrant nonsense. Obviously, every time NBC selects one of its own programs, the slot in the schedule occupied by that show cannot be occupied by a program produced by someone else. The exclusion that results when NBC chooses an NBC program is no different from the exclusion that results when NBC chooses an MCA program instead of a Warner Bros. program. As far as Warner Bros. is concerned, the result is the same. *See* Fisher Affidavit at 6a-7a, *infra*. Competition among producers is no more suppressed when NBC selects one of its own

*See comments on the proposed decree submitted by the Institute for Public Interest Representation (letter from Victor H. Kramer and Thomas Krattenmaker to Bernard M. Hollander, dated January 19, 1977).

**See pp. 8-9, *supra*.

programs than it is suppressed when NBC selects an MCA program. Moreover, the CIS fails to consider that the production limitation eliminates the likelihood that the large market shares of others—which, in the case of MCA, approximates 30% of NBC's prime time entertainment programming—will be threatened with erosion by, among other things, NBC's competition. But that threat is the essence of competition.* Thus, for the CIS to claim, without the slightest rational explanation, that prohibiting NBC from selecting one of its own programs will "enhance competition", when in fact it will suppress it, is simply to call black, white.

In so far as the CIS says anything about the effects on competition likely to result from the alteration of the terms of trade on which NBC may contract with program suppliers, it provides not an explanation, but only the spare and opaque statement that the "regulatory" provisions of the decree will enable program suppliers "to compete free of the artificial leverage which NBC, and other networks, have exercised in the past". CIS at 9. Plaintiff may know what is meant by "artificial leverage"; we certainly do not. A CIS should not be a guessing game. It should state forthrightly the anticipated effects on competition. Instead, plaintiff offers up a meaningless formula of words.

Furthermore, inasmuch as one of the paramount objectives of the

*We do not deny that NBC's presence as a competitor or potential competitor in program production may be quite uncomfortable for program suppliers, but here as in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 45 U.S.L.W. 4138 (U.S. Jan. 25, 1977), the grievance is at best that they are being deprived "of the benefits of increased concentration". *Id.* at 4141. Their position is entirely analogous to the plaintiffs' in *Brunswick* who claimed that the antitrust laws had been violated when Brunswick, one of the two largest manufacturers of bowling equipment in the United States, acquired a large number of failing bowling alleys to whom it had extended credit. Plaintiffs sought as damages an amount equal to the increased profits they would have earned had Brunswick allowed the defaulting bowling alleys to close. The Supreme Court rejected this claim, holding that "the profits [plaintiffs] would have realized had competition been reduced" were not recoverable as antitrust damages. *Id.* The Court stated that "it is quite clear that if [plaintiffs] were injured, it was not 'by reason of anything forbidden in the antitrust laws'. . . ." Indeed, the Court explained, since the "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) . . . [i]t is inimical to the purposes of these laws to award damages for the type of injury claimed here." *Id.*

Sherman Act is lower prices,* the CIS certainly ought to have indicated what impact the proposed decree will have on the price of programing. The CIS does not deal explicitly with that subject, however, and in so far as it says anything implicitly, it says—we believe correctly—that the price of programming will rise.** Of course, for the Government to have said that explicitly would have exposed what the CIS carefully conceals: the decree will drive up prices by suppressing competition. As the Fisher Affidavit states (at 5a-6a, *infra*):

> "... one can either seek to stimulate competition among sellers (and thereby drive down price) or one can seek to increase the remuneration that sellers receive (by driving up price), but one cannot increase sellers' remuneration by stimulating the competition among them. In so far as the Government's goal is to increase the remuneration of program suppliers, the decree may well achieve that goal, but it will do so only to the extent that it suppresses competition among them."

In sum, the CIS fails either to warn of the competitive costs of the proposed decree or to demonstrate any competitive benefit. Since those costs are quite significant and any benefit is far from self-evident, this failure is sufficient reason to reject the proposed decree.

See, e.g., Northern Pacific Ry. v. United States, 356 U.S. 1, 4-5 (1958) (emphasis added):

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, *the lowest prices*, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the act is competition."

***See also* Memorandum of the United States in Opposition to Defendants Motion for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10 ("the independent television production industry is suffering undue hardship at a time when network profits are soaring") and 20-21 ("the network effectively precludes the producer from receiving payment commensurate with the success of his program and from re-negotiating his contract . . . . All three networks engage in parallel conduct with respect to the below cost pricing . . . .").

Moreover, the CIS is defective in two other critical respects, as we show below. It fails to provide an adequate understanding of the nature and purpose of the proceeding and the practices and events giving rise to the alleged antitrust offense, and it fails to provide a rational link between whatever harm is complained of and the relief set forth in the proposed decree.

B. The Statement of Nature, Purpose, Practices and Events Is Either Unintelligible or Devoid of Antitrust Significance.

The APPA requires the Government to specify the "nature and purpose" of the case and the "practices or events" upon which it is based. 15 U.S.C. § 16(b)(1), (2). Such information is obviously necessary in order adequately to assess a proposed decree. Nevertheless, the CIS fails to meet those requirements. Moreover, in so far as the CIS purports to identify nature, purpose, practices and events, it is unintelligible and hence does not provide the basis for analysis required by the APPA. Indeed, what it says is either so contradictory or so devoid of antitrust significance as to retard rather than advance analysis.

For example, the CIS states (at 2) that each of the networks has "monopolize[d] prime time television entertainment programming", which would seem necessarily to mean that the networks are not in competition with one another. But the CIS goes on to state (at 13) that Section VII of the decree, which provides that certain provisions of the decree will not go into effect until similar injunctive relief is obtained against CBS and ABC, is needed to "avoid placing NBC at a competitive disadvantage with respect to CBS and ABC . . . ." The Government does not explain the clear incompatibility between these two claims. One can only be placed at a competitive disadvantage with respect to one's competitors; but if NBC is in competition with ABC and CBS, it is clearly not a monopolist.*

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*Of course the claim that the three networks do not compete with one another is a fiction. *See e.g., Columbia Pictures Industries, Inc. v. American Broadcasting Companies, supra*, 1974-1 Trade Cas. at 96,095 ("The television networks are in vigorous competition with each other. They are engaged in a continuous and lively rivalry for the attention of audiences, which is the very crux of their commercial objectives."); Fisher Affidavit at 2a, n.1, *infra*; Posner Affidavit at 73a-75a, *infra*.

The CIS proceeds from inconsistency to absurdity when it states that

> "NBC, through its affiliated television stations, has control of access to approximately 98% of all United States television households for programs which it offers for broadcast." CIS at 3.

Does this statement mean that NBC controls access to 98% of the viewing audience, with CBS and ABC dividing the remaining 2%? Obviously not, since the Government has also charged that CBS and ABC also "control access" to a like percentage of all television households.* Thus, the quoted statement must mean that the "control" NBC exercises is compatible with the exercise of like control by both CBS and ABC. But that means that none of the three exercises "control" in any known sense of that word. Thus, one must ask what does "control of access" mean? What, for example, happened to NBC's alleged "control of access" when ABC attracted 71% of the national viewing audience last month with "Roots"? The absurdity becomes even more apparent if we apply the above quoted statement to Macy's, Bloomingdale's and Gimbel's, assuming they are the only department stores in town:

> "Macy's, Gimbel's and Bloomingdale's each have control of access to approximately 98% of all New York City department store customers for the goods which they offer on their counters."

That says no more than that Macy's, Gimbel's and Bloomingdale's are in competition with each other.

When, based on the notion of "control of access", the CIS attempts to capsulize the gravamen of the complaint, it ascends to the

*See Plaintiff's Second Request for Admission of Facts, *United States* v. *CBS Inc.*, Civ. No. 74-3599-RJK (C.D. Cal.), filed Dec. 27, 1975, ¶ 15; Plaintiff's Second Request for Admission of Facts, *United States* v. *American Broadcasting Companies, Inc.*, Civ. No. 74-3600-RJK (C.D. Cal.), filed Nov. 4, 1975, ¶ 15.

surreal. According to the CIS, the central economic problem to which this antitrust suit is addressed is that:

> "[E]ach of three networks controls program producers' and advertisers' access to the nation's commercial television audiences and each network has abused its power by refusing access to programs which it did not produce or in which it had no financial interests." CIS at 7.

This statement is without a shred of antitrust significance, as the analogy to Macy's, Bloomingdale's and Gimbel's makes clear. No one has ever suggested any impropriety in the fact that each of those stores pursues the normal practice of selling goods that they have either produced or bought (*i.e.*, in which they have acquired an "ownership" or "financial interest"). Conversely, it would not be surprising if these stores declined to sell goods that they did not own and declined also to let other people set up counters in their stores. Again, if we simply take the Government's language and apply it to the department store analogy, its absurdity becomes patent:

> "[E]ach of the three department stores controls manufacturers' access to department store customers and each store has abused its power by refusing access to goods which it did not produce itself or which it had not bought at wholesale."

If this statement makes out a violation of the antitrust laws, then the norm of the American economy is the continuous and universal violation of those laws.

The notion lurking in the CIS that the networks supply program suppliers "access" to the television viewing audience is utterly bizarre. The networks are not "selling access" to program suppliers; they are buying programs from them. And program suppliers are not "buying access" from the networks; they are selling programs to them. To be sure, program suppliers are delighted when large numbers of viewers choose to watch their programs, but the fact remains that the people who are their customers and by whom they are paid are the networks

and other program purchasers, not the remote, unpaying viewing audience.

No matter how the Government rephrases its arguments premised on the notion of "control of access", it does not come close to making out a violation of the antitrust laws. For example, the Government states:

> "There is a substantial economic incentive for NBC to gain control of programming on its network, and NBC has exercised its control of access to the viewing public so as to exclude from the NBC Television Network programs controlled by others." CIS at 4.

Again, the same could be said of Macy's:

> "[T]here is a substantial economic incentive for Macy's to gain control of (*i.e.*, buy) the goods it subsequently sells from its counters, and Macy's has exercised its control of access to those who shop at Macy's so as to exclude from Macy's counters goods controlled by others."

As part of its infatuation with "control of access" the Government stresses the decline of advertiser-supplied programming as one of the events giving rise to the alleged antitrust violation. CIS at 5. Yet the reasons for the decline of advertiser-supplied programming are well known and have nothing to do with "control of access". As the FCC has said in announcing the new Network Practices Inquiry, the decline in advertiser-supplied programming

> "is largely attributable to increases in the costs of producing programming as well as the costs of network advertising time. Between 1960 and 1976, the average cost of a single half-hour episode of a new prime-time program increased by about 237 percent from nearly $49,000 to approximately $165,000. Network program expenditures reflected this trend, rising from $376,918,000 in 1960 to $1,273,241,000 in 1975, an increase of 238 percent. The average cost of a thirty-second tv advertising spot rose by 153 percent during the same period. Cost increases have also been accompanied by a general recognition that shorter commercial messages are, for the most part, more cost effective than longer tv advertisements. . . . Given these developments, it is not surprising that advertisers have become increasingly inclined to spread their commercials over a larger number of programs. Consequently, they no longer produce their own regularly scheduled programming but, rather, purchase a number of commercial spots which are usually placed in a variety of programs." Network Practices Inquiry, Notice at 91a-92a, *infra*.

Moreover, the FCC has recognized that while this development has inevitably "shifted almost exclusive control over the development and selection of programs to the networks, it has also permitted more businesses, particularly small ones, to use television as an advertising medium." Network Practices Inquiry, Notice at 92a. The CIS simply ignores these factors in its discussion of the decline of advertiser-supplied programming. But in light of these factors, it is not apparent how the antitrust claims in this case can have arisen from that decline.

C. The CIS Does Not Disclose Any Rational Link Between the Purported Harm and the Proposed Decree.

Not only does the CIS speak nonsense about the "nature and purpose" of the case and the "practices or events" giving rise to it, but it fails to articulate in any comprehensible fashion how the proposed decree relates to the charges of the complaint.

The complaint charges that NBC has monopolized the "trade and commerce in entertainment television programs exhibited on the NBC television network during prime evening hours" (Complaint, ¶ 16). Even assuming that this is a relevant market (and, hence, that NBC

does not compete with ABC and CBS for programs),* nothing in the decree remedies the supposed evil, since nothing in it increases the competition that NBC will face from ABC or CBS in any market, relevant or otherwise. Nor does the CIS even claim the decree will increase that competition. Indeed, in so far as the decree would prevent the networks from competing as producers of programs, it circumscribes the area in which they can compete with one another. Moreover, by limiting the terms on which the networks may deal with program suppliers, the decree prevents the networks from competing with one another for those rights which the decree would prevent them from buying from program suppliers.**

The complaint charges that the effect of NBC's behavior has been to suppress competition in the production of television programming (Complaint, ¶ 19(b)). But even assuming that NBC has inexplicably chosen to suppress competition among its suppliers (and, hence, to drive up the price it must pay for programs), the CIS fails to explain how the decree will enhance such competition and ignores the possibility that it will actually suppress it by limiting NBC's status as a potential competitor in the production of programming and by increasing the financial risks borne by small or potential producers.

The complaint alleges that NBC has "control[led] the prices paid by NBC for television exhibition rights to motion picture feature films" (Complaint, ¶ 17(d)). Even assuming that it is wrong for NBC to stop buying feature films when the price for them is too high, nothing in the decree requires NBC to buy feature films at prices it deems too dear; this is again a point on which the CIS is silent.

The Government alleges that the networks are forcing program suppliers to "deficit finance" the programs they produce.† The decree will not only not remedy the "problem", but will, as the Fisher Affidavit states, actually "reduce the flow of funds from the network at

But see Fisher Affidavit at 2a, n. 1, *infra*; Posner Affidavit at 73a-75a, *infra*.

***See* Fisher Affidavit at 10a, *infra*.

†Memorandum of the United States in Opposition to Defendants' Motions for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10, 20.

the early stages of production and broadcast" and thus exacerbate the alleged evil of "deficit financing".*

As noted above, the Government apparently attaches importance to the decline in advertiser-supplied programming, but there would appear to be nothing in the decree, and the CIS does not claim that there is, which will encourage advertisers to reenter the program supply business or increase their chances of success should they try. The factors which the FCC has cited as explaining the decline in advertiser-supplied programming are certainly not affected by the decree; the costs of producing programming as well as the costs of network advertising time will not be reduced by the decree. Indeed, they may be increased since the suppression of competition among program suppliers that will result from the decree will presumably lead to even higher program costs and prices which will in turn lead to higher costs and prices of network advertising time.

Finally, the Government has charged that NBC insists on a high rate of program clearance by its affiliates,** but there is not a single provision in the decree even mentioning much less affecting NBC's relationship with its affiliates, and the CIS understandably does not claim any such effect.

In sum, the decree is a mass of highly complex relief in search of a logical relationship to the harm it is intended to remedy. The CIS does not aid in that search. Indeed, it repeatedly suggests that the "harm" to be remedied is illusory.

*Fisher Affidavit at 15a, *infra*. As Professor Fisher explains (*id.* at n. 14), "to some extent the proposed decree tracks the FCC financial interest rule. 47 C.F.R. § 73.658(j)(ii). There is good reason to believe that that rule has had precisely the effect that I suggest [*i.e.*, increasing deficit financing]. Thus, Edward A. Montanus, Vice President of MGM-TV, is quoted in Exhibit 4(a) (p. 52) of the affidavit of Bernard M. Hollander, sworn to January 19, 1976, as follows:

> 'When the networks were allowed to invest in shows for a minority interest, they assumed much of the burden that represents our deficit financing today.'

See also Crandall, *FCC Regulation, Monopsony, and Network Television Program Costs*, 3 Bell Journal of Economics and Management Science 483 (1972)." (This article is annexed as Ex. 2 to the Fisher Affidavit at 33a-58a, *infra*.)

**Plaintiff's Supplemental Statement of Genuine Issues, served May 21, 1976, at 5.

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Conclusion

For the foregoing reasons, CBS urges that the proposed decree should not be entered.

Respectfully submitted,

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March 1, 1977

APPENDIX A

AFFIDAVIT OF FRANKLIN M. FISHER

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

FRANKLIN M. FISHER, being duly sworn, deposes and says:

I am a Professor of Economics at the Massachusetts Institute of Technology. My curriculum vitae, including a list of the books and articles I have written, is set forth in Exhibit 1.

I have been asked by counsel for CBS Inc. to analyze the probable economic impact of the proposed consent decree submitted to the Court in United States v. National Broadcasting Company, Inc. on November 17, 1976. I have also been asked to assess the Competitive Impact Statement ("CIS") filed by the Government with the proposed decree. In carrying out that analysis and assessment, I have taken into consideration numerous studies, articles, reports and other materials relating to the production, procurement and distribution of television entertainment programming, including reports of the Federal Communications Commission ("FCC"), industry and trade publications, interviews with executives in the broadcasting, program production and advertising industries, testimony of program suppliers and others engaged in those industries, and the pleadings, affidavits and other

materials filed in United States v. NBC and the companion actions against ABC and CBS.

I have reached the conclusion that the proposed decree would tend to diminish competition. I have also concluded that the CIS fails to describe the competitive impact of the proposed decree.

Introduction

As in any market, there are two aspects of competition to consider: competition among sellers and competition among buyers. If NBC has any power in the market for television entertainment programs purchased by networks, it is surely power that it has as a buyer.[1] Indeed, it is that power which is stressed by both the Complaint (¶¶ 7, 10) and the CIS (at 3, 4-5). NBC is indisputably a

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1. For purposes of this affidavit I shall generally assume that the market definition of the Government complaint makes sense and that it is appropriate to define the relevant market as consisting of "the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours" (Complaint ¶¶ 16, 17).

It should be noted, however, that such a narrowly drawn market--excluding as it does programs sold to ABC and CBS--makes no sense whatever for purposes of economic analysis since it is clear that ABC, CBS and NBC are in competition with each other not only for audiences and advertising revenues, but also for programs which attract audiences and thus earn advertising revenues. Indeed, the decree (Paragraphs VII and IX) and the CIS (at 14) proceed on the supposition that NBC is in competition with ABC and CBS and should not be "placed at a competitive disadvantage with respect to CBS or ABC".

major buyer. It acquires rights to approximately one-third of the entertainment programs carried by the three television networks and, obviously, rights to all of the programs carried by NBC.

On the other hand, NBC's share of any market as a producer of such programs is quite small and has steadily declined over the past twenty years. In 1974-75 NBC-produced programs amounted to approximately 4.2% of the prime time entertainment programs carried by NBC and approximately 1.4% of the total carried by all three networks.[2] With either of those market shares, it is impossible to believe that NBC has monopolized or poses a credible threat of monopolizing the production of television entertainment programs. Indeed, if the Government is correct in asserting that NBC as a buyer of programming has been able to drive suppliers to the wall and leave them "hanging on by a slender thread"[3]--in other words, if NBC can drive the price it pays down to the barest minimum needed to keep suppliers in business--it is hard to

2. See Affidavit of J. Marshall Wellborn, sworn to November 25, 1975, submitted in support of NBC's Motion for Summary Judgment on the Sherman Act Claims.

3. According to the Government, NBC has inflicted "undue hardship" on program suppliers by not giving them "payment commensurate with the success" of their programs. Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10, 20.

see how NBC could obtain any additional advantage by monopolizing the production of programming for NBC. That is, if, as the Government asserts, NBC can force "deficit financing" on its suppliers, there cannot be any advantage to NBC in making those deficits its own. Nor is it credible that NBC would monopolize the production of television programs for NBC in order to be able to drive up the price it must pay as a buyer of television programming.

It must be recognized that, notwithstanding the allegation of the complaint that NBC has sought to suppress competition among the suppliers of television programming to NBC, it cannot possibly be in NBC's interest to suppress competition among its suppliers either by monopolizing the production of programming or by any other means. Doubtless NBC, like any other buyer, seeks to pay the lowest possible price to its suppliers; but, like any other buyer, NBC can achieve that end by stimulating competition among its suppliers and not by suppressing such competition.

Given NBC's insubstantial position as a producer of programming and its interest in maximizing competition among its sources of supply, and in light of the focus of the complaint and CIS, one would have expected the proposed consent decree to focus on NBC's alleged power as a buyer. Strangely, the proposed consent decree is not designed to augment the competitive constraints to which NBC is subject as a buyer;

if, as the complaint alleges, NBC were a monopsonist (i.e., a monopolist buyer) before the decree, it would be a monopsonist after the decree. Instead of dealing with NBC's alleged monopsony power, the decree seems calculated to diminish competition among program suppliers, as I show more fully below. Although such a restriction of competition among suppliers might tend ultimately to increase their bargaining power and thus might result in a transfer of income from NBC to certain of its suppliers, shifts of that sort do not increase competition at any level and do not serve the public interest in economic efficiency that a procompetitive policy is designed to foster.

To be sure, at one time or another restrictions on competition among suppliers have been fostered by a variety of Government programs including, for example, the National Industrial Recovery Act, the Agricultural Adjustment Act, and the National Labor Relations Act. But the Sherman Act is not of that sort. The policy of preserving and promoting competition as the governing mechanism of the market place simply cannot be served by suppressing competition among sellers to counterbalance a real or supposed absence of competition on the buying side. Stating the matter differently, the bargaining between buyer and seller, however intense, is not a species of competition.

To put it simply, one can either seek to stimulate

competition among sellers (and thereby drive down price) or one can seek to increase the remuneration that sellers receive (by driving up price), but one cannot increase sellers' remuneration by stimulating the competition among them. In so far as the Government's goal is to increase the remuneration of program suppliers, the decree may well achieve that goal, but it will do so only to the extent that it suppresses competition among them.

For the reasons set forth below, I believe that the decree would, in fact, tend to reduce competition among program suppliers. Inasmuch as the Government's complaint charges that NBC has, inexplicably, pursued the self-defeating course of restricting competition among its suppliers, it is particularly strange to submit a decree which would itself operate to restrict such competition.

1. The Proposed Decree Would Restrict Supply.

Paragraphs V(A) and (B) of the decree severely restrict the extent to which NBC may produce its own programs. This restriction reduces the number of sources of supply of programs competing to be purchased by television networks. If an existing independent supplier (such as MCA or Warner Bros.) or a potential supplier were so restricted, the adverse effect on competition would be perfectly obvious. But there is no practical difference between restricting NBC

as a supplier and restricting any other supplier. NBC's ability to produce simply provides another source of supply to which it can turn, and it thereby contributes to competition among program suppliers by providing an incentive for them to sell to NBC at as low a price as possible lest NBC increase its internal production. The case would be precisely the same if there were a wholly new, independent source of programming with NBC's production capacity. The existence of such a source would contribute to competition among existing program suppliers by providing an incentive for them to sell to NBC at as low a price as possible lest NBC expand its purchases from the new company. In either case, removal of such an incentive is anticompetitive. Furthermore, the elimination of NBC as a competitor cannot be viewed as forestalling predation since not only is NBC now producing a miniscule part of its own requirements but also, as I have indicated above (pp. 3-4), it is impossible to suppose that NBC would seek to drive its suppliers out of business in order to monopolize the business of producing for itself.

Restricting NBC's production not only restricts the supply of television programs carried by NBC but also restricts supply in the market for network television programs generally (or, in terms of the markets alleged by the Government, in the markets for network television programs

shown on CBS or on ABC). This is so because all three networks face a common supply of programs.[4] The aggregate demand of the three networks is undiminished by the decree (i.e., they will each remain free to schedule approximately 3 hours of programming per night and 21 hours per week), but the potential supply to meet that demand is decreased. This necessarily causes an effective reduction in the supply of programs available to CBS and ABC as well as NBC.[5]

The impact of the decree's restriction on NBC's production is economically significant even though NBC has not recently been a substantial producer of television programs. Indeed, even if NBC produced nothing, its status as a potential producer standing in the wings, with the capacity to produce and a vital interest in the adequacy of supply, would have a significant procompetitive impact.

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4. Exhibit 7 to the Affidavit of Robert S. Rifkind, sworn to November 18, 1975, submitted in support of CBS's Motion for Summary Judgment on the Sherman Act Claims. That exhibit, which has not been challenged by the Government, shows for the 1970-71 through 1974-75 television seasons that 67 firms supplying approximately 63% of the three networks' prime time entertainment programming supplied at least two of the three networks and that 24 firms supplying approximately 57% of the total supplied all three networks.

5. The fact that the decree does not prevent NBC from selling to CBS or ABC is not of any practical consequence. No network could afford to depend on its close rival for any part of its regularly scheduled programming. It is easy to imagine the dilemmas that would arise if NBC were the supplier to CBS of a highly successful series such as "All In The Family".

The proposed decree would eliminate NBC as a potential entrant. It must be noted, moreover, that the Government seeks the elimination not only of NBC but also of CBS and ABC as program suppliers.[6] Thus the reduction in supply or potential supply contemplated by the proposed decree would appear to be significant.

In view of the inherent anticompetitiveness of eliminating a supplier or potential supplier, I would have expected a statement assessing the "competitive impact" of the proposed decree to consider the obvious anticompetitive effects of the decree's production limitation. The CIS does not begin to analyze this important subject, however.

2. The Decree Will Not Affect NBC's Alleged Status as a Monopsonist But Will Tend to Increase Concentration in the Supply Industry.

I have shown above that the effect of Paragraph V of the proposed decree will be to diminish competition among program suppliers by removing NBC as a supplier and that the decree is thus inconsistent with a procompetitive public policy. Also inconsistent with such a policy are the provisions of the decree that seek to alter the terms on which NBC may deal with program suppliers. For example, under the decree a producer may not, when selling to NBC the network

6. See Paragraph VII of the proposed decree.

broadcast right to the initial episodes of a series, also sell to NBC the right to repeat network showings in subsequent seasons of more than three of those episodes[7] or the right to carry a program for more than four years[8] or the right to the exclusive broadcast use of a program throughout its network run.[9] Such an alteration by fiat of the terms of trade between networks and program suppliers will not alter NBC's alleged status as a monopsonist and indeed may well have the effect of further increasing concentration and restricting competition in the supply industry.

I find nothing in the proposed decree that would enhance the competitive constraints to which NBC is subject as a buyer. Such competitive constraints can only be imposed by NBC's actual or potential competitors in the purchase of programming--i.e., other buyers, including, particularly, CBS and ABC. But there is nothing in the decree that affects NBC's relationships with CBS and ABC. Indeed, the Government specifically states that the decree is designed "to prevent [NBC] from being placed at a competitive disadvantage with respect to CBS or ABC" (CIS at 14). The Government's proposed alteration and regulation of the terms on which NBC may

7. Paragraph VI(H).

8. Paragraph VI(E)(i).

9. Paragraph VI(E)(ii)(a)-(c).

deal with its suppliers does not increase competition among the buyers of network programming.

Indeed, since the decree does not increase such buyer's competition, it cannot affect any power NBC might have over the price it pays its suppliers, except to the extent that it suppresses competition among them. So long as NBC's suppliers compete with one another, they will bid the price of the rights they sell down to a competitive level, and NBC will pay a competitive price for those rights. When told that it can no longer buy all the rights it used to buy, NBC will pay less for the rights it continues to buy because it will be getting less. The suppliers, competing for NBC's favor, will accept less from NBC because they are getting more elsewhere. Indeed, the reduction in what NBC pays will be equivalent to the value to the supplier of the rights the supplier may no longer sell to NBC. The value to the supplier of those rights will be no greater than the value it received when it sold these rights to NBC since, by hypothesis, NBC bought the rights at a competitive price.

In sum, the effect of limiting the rights that NBC can buy from those suppliers will be to reduce, by the value of those rights, what NBC will pay to the suppliers, irrespective of whether NBC is a monopsonist or not. The decree's alteration of the terms of trade will enhance the aggregate remuneration of the suppliers only to the extent that it

reduces competition among them. I show later that it is likely to do precisely that.

To say that the alteration of the terms of trade will not increase the competitive constraints to which NBC is subject as a buyer is by no means to say that the provisions of the decree that effect this alteration are economically irrelevant. Indeed, a decree which restricts the rights that may be bought and sold might in itself be though a restraint of trade. Obviously certain restraints of trade--such as an agreement to buy a barber shop only if the seller agrees not to open a new barber shop across the street--may be needed for the functioning of the market. But I foresee no such effects from this decree's restrictions; on the contrary, there may well be further harmful effects.

For example, to preclude program suppliers, when selling to NBC network broadcast rights to the initial episodes of a series, from also selling NBC the right to repeat network showings in subsequent seasons of all such episodes would not seem to serve any procompetitive purpose where NBC perceives a popular demand for additional broadcasts. If a network wants to pay for such repeats because it believes it will have an audience for them, and if the supplier is willing to sell the right to such repeats, how will competition be promoted by forbidding such a transaction?

Moreover, such a restriction could be affirmatively harmful in at least two respects. First, if a network, at the time it contracts to buy original episodes, cannot also contract to buy repeats, it will pay less for what it is getting in the original transaction.[10] Since it will be paying less at a time when the program supplier is incurring production costs, the result will be artificially to force back on to the program supplier the risk that the value of the repeats will prove to be little or nothing because the show has had little or no success. If the show is successful, the supplier will win, if unsuccessful he will lose, but he will in any case be forced to accept the gamble and deeper "deficit financing". Second, the prohibition on the purchase of repeat rights will, as a practical matter, preclude a network from abandoning the current practice of running original and repeat episodes in the same year in favor of running, for example, only originals in the first year and only repeats in the second. Since such a pattern would be extremely expensive in the first year, it would be commercially feasible only if the network knew at the outset that the second year would be correspondingly inexpensive so that

10. An option to run repeats of a series in future years obviously has a present value and that value necessarily affects the level of "up front" network payments for outline, script, pilot and the initial episodes of a series.

the aggregate cost would be approximately the same. The decree, however, would preclude such a new pattern for running repeats and would essentially lock the networks into the present pattern. Thus, they would be prevented from trying to compete with one another by organizing their program formats in novel ways.

One might as well tell an author that he cannot sell the right to the publication of more than 5,000 hard cover copies of a book, even though he has a publisher who wants to pay for the right to print 10,000 copies. Even if such a restriction would accelerate reissue in paperback, it hardly helps the author to realize the maximum value from his work in his dealings with the publisher or the publisher to employ his resources in the manner he deems most efficient.

Similarly, it is hard to see the economic utility of the provision in the decree proscribing the sale of an option for more than four years.[11] By forcing program suppliers to sell fewer years "up front" and thus to be paid less "up front",[12] this provision would force them to take

11. Paragraph VI(E)(i).

12. The option to run a series in future years, just like the option to run repeats discussed above, has a present value that affects the level of "up front" payments for outline, script, pilot and the initial episodes of a series. Thus, to limit the number of options for future years of a program that may be sold will have the effect of reducing these "up front" payments.

the risk that the rights to the fifth and later years, which they can no longer sell at the outset, will be worth little or nothing because the program has had little or no success in the earlier years. In short, they would be substantially restrained in seeking to lay off their risks. By comparison, authors selling books to publishers are not forbidden from selling at the outset the right to keep the book in print after four years. Such a prohibition might ultimately enrich the authors of books that turned out to be long-lived best sellers, but it would surely reduce the incomes of the rest.

In general, it may be said of the decree's proposals concerning the terms of trade that they will tend to reduce the initial funding that program suppliers will receive from the networks. In light of the Government's assertion that so-called "deficit financing" by producers is an evil to be eliminated,[13] the decree's alteration of the terms of trade in a fashion that must reduce the flow of funds from the network at the early stages of production and broadcast is particularly odd since it will exacerbate the alleged evil.[14]

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13. Memorandum of the United States in Opposition to Defendants' Motions for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10, 20.

14. I recognize that to some extent the proposed decree

The most important result of the alteration of the terms of trade by the proposed decree may be a substantial increase of concentration and restriction of competition among program suppliers. Under the proposed decree, program suppliers will have to find alternative means of realizing the value of the rights they are prohibited from selling to the networks. In principle, the suppliers will have to decide whether to sell those rights at the outset or to hold them for later exploitation. The latter course necessarily involves assuming the risk that the rights will prove to be of little or no value because the program has enjoyed little or no popularity. It also necessarily involves deferring for some appreciable period of time cashing in on whatever value those rights may have.

Some suppliers may be happy to assume those risks

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tracks the FCC's financial interest rule. 47 C.F.R. § 73.658(j)(ii). There is good reason to believe that that rule has had precisely the effect that I suggest. Thus, Edward A. Montanus, Vice President of MGM-TV, is quoted in Exhibit 4(a) (p. 52) of the affidavit of Bernard M. Hollander, sworn to January 19, 1976, as follows:

> "When the networks were allowed to invest in shows for a minority interest, they assumed much of the burden that represents our deficit financing today."

See also Crandall, "FCC Regulation, Monopsony, and Network Television Program Costs", 3 Bell Journal of Economics and Management Science 483 (1972). This article is appended to this affidavit as Exhibit 2.

and be financially capable of deferring the receipt of cash. Others may be either unwilling or unable to do so. This group is likely to include suppliers "yet unborn" who will be deterred from entry by the necessity of bearing increased risks. It would also include those already in the industry who are financially weak or risk averse, such as new, independent producers struggling to establish themselves. Such producers will presumably seek new buyers for the rights they can no longer sell to the networks. If they fail to find buyers, they may go out of business, either because they are unwilling to gamble on the success of their programs or because they will lack the financial resources needed to produce programs of a quality that will compete successfully. In either case, the result will be to concentrate production in the large, well-established firms, notably the major motion picture studios (some of which are subsidiaries of large conglomerates) which already enjoy the lion's share of the production business (as explained more fully below).

If producers do find buyers for these rights, who are the buyers likely to be? Three principal buyers--the three networks--will have been forced out of the market by the NBC decree and its counterparts. The most likely alternative buyers are the firms that are already in the business of acquiring such rights--again, the major studios. It is

extremely doubtful that any procompetitive purpose would be served by forcing the financially weaker producers to seek financing from their competitors by forbidding them from obtaining financing from their customers.

It must be noted that the major studios (Universal, MGM, 20th Century-Fox, Warner Brothers, Paramount, Columbia Pictures) already occupy a large share of that market, with Universal in particular supplying a very high share of the programs carried by NBC.[15] Whatever the relationship between concentration and competition, it is odd that the Government should propose a decree in an antitrust suit that promotes concentration among program suppliers, particularly where the Government contends that competition among those suppliers has been restrained. Concentration resulting from the superior skill, foresight and industry of some competitors is one thing; concentration procured by fiat is quite another; and concentration resulting directly from a decree ostensibly

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15. Appended to this affidavit as Exhibit 3 is a chart that appeared in Variety on September 15, 1976, which identifies the suppliers of regularly scheduled, network prime time programs for the current 1976-77 season. (While this chart does not also identify the suppliers of the eleven and one-half hours per week of movies carried by the networks, it is commonly known that such programming, which this season constitutes over 18% of the networks' prime time entertainment schedule, is supplied mainly by the major Hollywood studios.)

intended to enforce the antitrust law is simply absurd.

I have carefully reviewed the CIS to see whether it deals with the prospect that the shifting of risks resulting from the decree's restrictions on the terms of trade will increase concentration and restrict competition among program suppliers. As stated, the CIS is completely silent on this question as on most questions having to do with competition rather than with protection of suppliers.

Conclusion

The focus of the decree and the CIS suggests that the Government's principal concern is in assuring producers a "reasonable" price for their goods. That can only be achieved by substituting a regulatory regime for a competitive market because under competition goods change hands at the market price--and not at a price that can be said by the Government to be abstractly "fair" or "reasonable". The decree serves the Government's apparent purposes to the extent that it substitutes regulation for competition. But regulation seldom succeeds in achieving the same desirable allocation of resources that results under competition. Indeed, there are usually inherent economic inefficiencies in regulation, not the least of which are the costs, burdens and delays of administering the regulatory regime.

The provisions in the proposed consent decree which are supposed to affect competition will be likely to decrease the very competition which the complaint claims NBC has, inexplicably, restrained, namely the competition among program suppliers. The decree will reduce the number of actual or potential suppliers of programs and the total supply of programs. Further, by restricting what producers may sell and networks may buy, the decree will not alter NBC's alleged status as a monopsonist but will probably lead to greater concentration in the production of programming and impair the ability of new, weak or risk-averse program suppliers to compete with the large, established studios.

Franklin M. Fisher

Franklin M. Fisher

Sworn to before me this
22nd day of February, 1977.

Albert F. Marcellino
Notary Public

ALBERT F. MARCELLINO
Notary Public, State of New York
No. 43-2519700
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1977

Exhibit 1
to the Affidavit of
Franklin M. Fisher

VITA

Name: Franklin M. Fisher

Born: December 13, 1934 (New York, New York)

Degrees:
A.B. Summa Cum Laude, Harvard University, 1956;
M.A., Harvard University, 1957
Ph.D. Harvard University, 1960

Fellowships, Scholarships and Professional Honors:
Phi Beta Kappa, 1955
Junior Fellow of the Society of Fellows, Harvard University, 1957-59
Econometric Society: Fellow, 1963- ; Council Member, 1972- ; Vice President, 1977-
Irving Fisher Lecturer at Econometric Society Meetings, Amsterdam, September 1968
Operations Research Society of America Prize for best paper dealing with a military subject published in Operations Research, 1967
Fellow of American Academy of Arts and Sciences, 1969-
John Bates Clark award, American Economic Association, 1973
F. W. Paish Lecturer, Association of University Teachers of Economics, Sheffield, England, April 1975

Positions:
Assistant Professor of Economics, University of Chicago, 1959-60
Massachusetts Institute of Technology: Assistant Professor of Economics, 1960-62; Associate Professor, 1962-65; Professor, 1965-
Ford Foundation Faculty Research Fellow in Economics, London School of Economics and Hebrew University, 1966-67
Visiting Professor of Economics: Hebrew University, 1973; Tel-Aviv University, 1973

Consultant, Federal Power Commission, 1965-69
Consultant, Federal Reserve Board, Price Statistics Committee, 1965-69
Member, The Brookings Institution Advisory Committee on Studies in the Regulation of Economic Activity, 1967-70
Consultant, National Association of Broadcasters, 1964-65
Consultant, The RAND Corporation, 1964-75
Consultant, Institute of Naval Studies, 1965-66
Consultant, General Services Administration, 1966-67
Consultant, President's Task Force on Communications Policy, 1968

Associate Editor: Journal of the American Statistical Association, 1965-68

American Editor: Review of Economic Studies, 1965-68

Editor: Econometrica, 1968-1977

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Exhibit 2
to the Affidavit of
Franklin M. Fisher

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FCC regulation, monopsony, and network television program costs

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In this paper, a television program cost function is derived from a simple model of network rivalry based upon the Cournot postulate. This cost function is then fitted to data from a cross section of new network entertainment series for 1960–1965. The resulting estimates are quite unfavorable to two different aspects of FCC policy towards television broadcasting.

First, the Commission's implicit attempt to create monopoly profits for networks and their affiliates in entertainment programming for the purpose of subsidizing nonremunerative "public interest" programming is shown to be extremely inefficient. As much as two-thirds of entertainment program costs are simply rents paid to star performers and other inputs to the program production process—rents which derive from the Commission's allocations policy.

Second, the Commission's recent decision to bar network investment in non-network rights to programs first exhibited on their interconnected stations is demonstrated to be unnecessary. The Commission has enunciated this policy in its recent Prime Time Rule in order to protect program suppliers from monopsonistic exploitation by the networks. But the cost-function estimates show that the networks have paid their suppliers the economic value of the non-network rights obtained in the initial bargaining process. The only effect of prohibiting network investment in these ancillary rights is to limit the ability of suppliers to sell risky assets.

1. Introduction

The Federal Communications Commission's recent admission that it is unable to regulate interstate common carriers of communications services may strike the casual observer as shocking, but it is no more than a candid admission of the problems facing this commission and others as they attempt to render precise judgments about market relationships which they cannot measure. Whether it is the Federal Power Commission regulating the supply of natural gas,[1] the Interstate Commerce Commission regulating surface transportation,[2] or the FCC regulating television broadcasting, a common problem looms. Without precise empirical knowledge of price-cost relationships, these regulatory bodies must sit as puzzled arbiters of conflicting claims made by various private and public interest groups.

One might think that the FCC requires little precise knowledge about television markets, since it does not regulate the networks' or stations' profits directly by limiting the prices charged to advertisers or by prescribing a minimum output level. Rather, the Commission focuses upon performance in "the public interest," which is variously defined as providing the maximum diversity or quality of television programming. But price-cost relationships are no less important in this pursuit than in the attempt to regulate common carriers, for the Commission has followed a policy of subsidizing nonremunerative "public-service" programming by protecting local stations and networks from new sources of competition. Severe restrictions upon "pay" television,[3] limitation on the growth of cable television activity,[4] and even quantitative restrictions upon network broadcasting during prime time are enacted principally to protect local television stations from an erosion in their profits—profits which the Commission wishes to see devoted in part to public service programming. But most restrictions upon competition at the local level result in the limitation of the number of national networks as well, for it is the paucity of local affiliates which has prevented entry into network broadcasting for two decades.

Unfortunately, what has not occurred to the Commission is the possibility that its attempt at cross-subsidization has largely failed and that it has simply conferred large rents upon performers and other persons involved in producing network entertainment programming. Nonprice rivalry among networks and local stations is likely to result in dissipation of the monopoly rents which the Commission wishes to allocate to public service programming, with the result that viewers are forced to contribute to the high salaries of television celebrities by sacrificing popular programming choices.

The most recent indication of the Commission's failure to grasp the nature of competition and nonprice rivalry in network broadcasting and program supply is to be found in its 1970 Prime Time Rule.[5] This decision limits network broadcasting in "prime time" (7:00 P.M. to 11:00 P.M., Eastern time) to three hours per day in the nation's largest 50 markets and prohibits network investment in subsequent non-network distribution of programs first exhibited on national television. The latter prohibition is designed to protect program suppliers from network monopsony power, but the FCC

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Research support for the empirical research reported in this paper was provided by a Post-Doctoral Fellowship in Public Utility Economics granted by the American Telephone and Telegraph Company. Additional support was provided by the Department of Economics at M.I.T. The data utilized in this paper were made available by the three network companies, but the conclusions reported herein are those of the author and do not necessarily reflect the opinions of the networks. Generous advice on matters of econometric estimation was provided by Professor Franklin M. Fisher, but responsibility for all errors remains with the author.

[1] See MacAvoy [4] for a rather plain appraisal of the FPC's performance.

[2] Among the almost universally critical studies of the ICC, the most recent treatise is that of Friedlaender [2].

[3] The Commission's attitude toward pay television is chronicled in the numerous decisions rendered under FCC Docket 11279.

[4] See Final Cable Television Decision [6].

[5] See *Report and Order* [9].

has no evidence that such power actually exists.[6] Even more troubling is the Commission's discussion of program "costs" in defending its rule-making, for there appears to be little recognition that these expenditures are not exogenously determined social opportunity costs.

Clearly, if the FCC is to pursue its policy of cross-subsidization, it could benefit considerably from careful research into the nature of network and local station rivalry and the determinants of programming expenditures. This paper represents a modest start in that direction, for in it we seek to provide an econometric estimate of a network program cost function by utilizing actual cost data from the three national commercial networks for 1960-1965.[7] Included in the program cost function are variables which measure the extent of network investment in non-network exhibition rights of programs first shown on the networks. The regression coefficients for these variables may be compared with financial returns from program distribution in order to determine the extent to which networks exercise monopsony power over their suppliers. In addition, we are able to derive from these regressions estimates of the magnitude of the economic rents which are siphoned off by performers and other inputs to the production of programs. Finally, we utilize the program cost regressions to draw some inferences about the price elasticity of advertising demand facing the networks.

2. Network markets

The product market. A network is in large part a broker of its affiliates' time. It contracts with these affiliates to sell time to national advertisers who may conceivably bring their own programming to the network for exhibition. In practice, the networks have also become program brokers, selling not only time but viewers.[8] Each network schedules its programs and offers commercial announcements at regular intervals during these program hours.

Since there are three or fewer competitive commercial stations in most local markets, there are only three national brokers. At present, a fourth broker would be able to offer advertisers fewer viewers at each hour for programs similar to those broadcast by its three rivals. Given the current profit margins (per unit sales), it is doubtful that a fourth network could survive with this disadvantage.

Despite the entry barriers provided by regulation of the spectrum and fewness of rival firms, network companies do not necessarily enjoy monopoly power in the national advertising market. Given the numerous substitute media—newspapers, radio, magazines, and local television advertising time—it is distinctly possible

[6] The informal, oral evidence heard by the Commission's staff is reproduced in two Interim Reports on television network program procurement [7]. The second of these reports will be referred to hereafter as the Second Interim Report.

[7] The years 1960-1965 were chosen because data for this period were most accessible when the author began to collect data for this study. Moreover, older data would be less valuable simply because network advertising sales were undertaken in a different fashion before the 1960s.

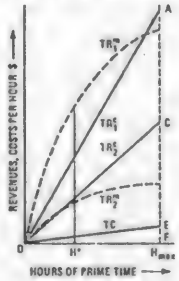
[8] For a detailed description of this development, see Crandall [1].

that variations in a network's output of viewer hours have no effect upon the price of viewer hours in the market. But even with a network television market demand curve, which is infinitely elastic at a per viewer exposure price set by competition from other media, the revenues per period for each network are a function of the number of rivals in network broadcasting. Unless the total number of viewers per hour increases in proportion to the number of rival networks—an unlikely possibility—any increase in the number of networks must decrease revenues per hour and, therefore, total revenues per year.[9]

If we assume that the number of viewers per hour of prime viewing time is constant, that they divide equally among the networks' offerings, and that the number of prime-time hours per year is fixed at H_{max}, the network's revenue function may be depicted quite simply as in Figure 1. If there is but one national network facing a competitive advertising market, its total revenue function, TR_1^1, will be linear with a slope AF/OF which is equal to revenues per hour, but the appropriate measure of a network's output is the number of viewer exposures to commercial messages of a given length. If the number of these messages is fixed per hour of broadcasting, output can be expressed in viewer hours of programming. The price of these viewer hours in a competitive advertising market is determined by the price of equivalent advertising messages in alternative media. Therefore, in this competitive setting, the network's revenues per hour are exogenously determined by the number of viewers watching television during each time period and the cost of advertising in the other media. The entry of a second network with access to equivalent affiliates and similar program fare will simply reduce each network's total revenue by one-half and shift its revenue function down to TR_2^1, where revenues per hour are equal to CF/OF. If program costs are invariant against changes in average audience size, each network incurs programming costs combined with brokerage, interconnection, and affiliation costs, which sum to a total cost per hour of TC. In this hypothetical world, entry could continue until the TR schedule of each network fell to a slope of EF/OF.

FIGURE 1

GROSS ADVERTISING REVENUES FOR A SINGLE NETWORK DURING PRIME TIME



Under these restrictive assumptions about viewer and cost behavior, network monopoly power in advertising markets simply alters each network's total revenue function. For instance, a single network's schedule becomes TR_1^m under the assumption that it faces the same price per viewer exposure as a competitive firm at an output corresponding to H^* hours of programming. Entry of a second network shifts the total revenue schedule down to TR_2^m, under the assumption that each firm chooses to broadcast the full H_{max} hours per year. The limit to entry occurs when the appropriate TR schedule is just tangent to the TC schedule. Obviously, this entry limit is reached sooner if networks enjoy monopoly in their advertising market than if they are perfect competitors in this market.

[9] At present, over 60 percent of the nation's homes have their receivers switched on during prime time. Clearly, this audience could not swell appreciably with the development of new viewing options.

We see then that the effect of "monopoly" power is somewhat different in network television from that in most normal markets. For instance, if entry is so effectively impeded by allocations policy as to allow only, say, two national networks, profits may be earned by each network even though its demand curve has infinite elasticity. Given the assumption of fixed audience sizes during prime time, monopoly power could only be exercised by limiting the number of hours broadcast. Thus, in this model, the existence of network monopoly power in advertising markets is quite unimportant except as it provides a limit to the number of networks which could compete successfully. Once we relax the assumption of fixed program costs, however, this conclusion is modified but not completely negated.

☐ **The input markets.** The preceding discussion abstracts rather heroically from reality. A television network does not face a fixed audience, but rather it may be assumed that its audience will vary with its choice of programming. Indeed, one might argue that the most important management decision in network broadcasting is the choice of programs and the scheduling of these programs against rivals' offerings. In addition, the network's affiliation costs —the prices it must pay for access to its affiliates—cannot be assumed to be given exogenously. We may dispose of the affiliation costs first, since the principal focus of this paper is upon program choice and program supply.

An important source of network rents is the limitation upon local station spectrum allocations. The FCC has allocated the spectrum to television in such a manner that no more than three competitive commercial stations may operate in a great number of markets. In those markets in which a fourth station may obtain a license, it is frequently limited to the UHF band. But a number of markets have four or more competitive local stations, and this inconsistent allocation provides the best of all possible worlds for the three existing networks. Without a fourth station in virtually every large market, a fourth network cannot hope to enter profitably, but the presence of four stations in many of the largest markets allows the networks to appropriate a large share of the rents from network broadcasting. With more stations than potential affiliations, cartel-like agreements among stations are not likely to develop in bargaining with networks, simply because there is no simple method for the winners to compensate the losers in the affiliation competition. Were there only three stations in every market, the local stations would certainly appropriate a larger share of the net revenues from the sale of network advertising.[10]

More important for this paper's analysis is the nature of program supply and the networks' position as purchasers of programming, especially entertainment programming. With the trend

[10] For an econometric estimate of the effect of local station competition for affiliation agreements, see Robbins [5]. Robbins' study reveals that the networks pay significantly more per home reached by affiliates in markets with three or fewer stations than they do in markets with four or more stations. Of course, a limit to the difference in compensation rates is provided by the threat of entry of a fourth network.

toward direct network negotiation with program suppliers came the possibility that networks might obtain monopsony power in program supply. In earlier years, a number of advertisers licensed their own programs and brought them to the networks in return for payment for an entire time period. In the past decade, however, this procedure has practically vanished for prime-time entertainment programming. For all intents and purposes, it is the networks who choose the programs in which advertisers intersperse their messages; but this is hardly sufficient proof that they possess monopsony power over the price of programs.

Entertainment programs are simply filmed or taped products which are exhibited on television rather than in alternative media. They require virtually the same inputs as motion pictures or other films and may be produced by any of scores of production companies throughout the world. Thus, television networks must bid resources away from alternative media in order to obtain their required program inputs. Given the increasing number of buyers of filmed products, it is quite clear that the networks' monopsony power must be limited.

Even if the three networks were the only buyers of filmed entertainment output, it would be necessary for program supply to be increasing cost for them to exert monopsony power. And if this monopsony power were exerted, it would become evident in the networks' failure to offer programming during some periods of considerable viewing frequency. Clearly, this last condition is not satisfied and has not been in the past few years. Before FCC restrictions on the length of the network program day, there were only occasional half hours during prime time which were not filled, and most of these periods were on A.B.C., which continues to have a comparative disadvantage in affiliations. Certainly, A.B.C. was not exerting monopsony power while N.B.C. and C.B.S. struggled along as competitors for programs!

But a more fundamental objection to the standard monopsony question obtains: it is impossible to draw a supply curve for homogeneous programs because programs are far from homogeneous. Networks are not buying standardized items from the supplying companies; rather, they are selecting the appropriate program input mix and contracting with suppliers to supervise their combination into programs. Given the number of such "packages" of programs, the networks need only promise them a return sufficient to cover their costs, including the costs of invested capital. They may pay no less; they need pay no more.

The quantity and value of resources employed by the networks in their entertainment programming depends upon the degree of competition for audience and the price per viewer which advertisers are willing to spend. The greater are program revenues, the greater will be network expenditures upon programming. Networks will choose to employ more reproducible resources per program, and nonreproducible inputs, such as star performers, directors, and writers, will obtain higher rents when program revenues are high. While increasing the number of networks may increase the percentage of revenues diverted to programming expenses, expenditures per program must certainly fall and with them rents to talent inputs.

But even if program costs vary directly with revenues, it is still possible that the condition of blockaded entry in network broadcasting finds each network with a total revenue function which is above the total cost function in Figure 1. All we have argued thus far is that the TC schedule will shift downward with the TR schedule as the number of networks increases, but TC will fall less rapidly than TR if nonprice rivalry increases with the number of competing networks. This is neither new nor profound, but it serves to emphasize two points: (1) neither monopoly power in advertising markets nor monopsony power in programming markets is required to yield the networks a substantial scarcity rent; and (2) the attempt by the FCC to create large excess profits in network entertainment programs in order to finance local and network "public service" programs may be frustrated by the nonprice competition which results. The latter point is especially important if program rivalry results in large increases in program costs which are not valued highly by viewers. To the extent that this rivalry simply bids up performers' rents, the profits are clearly wasted. If the rivalry takes the form of attracting scarce resources from other markets, an additional social cost results which must be weighed against the increase in viewer satisfaction. But, in any case, unless the FCC acts to curb this type of nonprice rivalry, its implicit attempt to create monopoly profits for the purpose of subsidizing other services is surely weakened.

☐ **Residual rights.** Few network programs are fully exploited during their network run. In practice, each network licenses the right to exhibit a program for one or more exhibitions, and if this program is recorded on videotape or film it may be shown subsequently in other markets. This further exploitation of the program is referred to as "syndication," and it assumes two forms. First, the program may be licensed to foreign markets almost simultaneously with its United States network exhibition. Such foreign syndication accounted for $57 million in revenues in 1967.[11] In addition, after the network program series has concluded its run, the program may be licensed to United States television stations for additional local exhibitions. These domestic "off network" syndication sales accounted for $43.1 million in total revenues in 1967.[12]

The success of a program in syndication sales to local stations and to foreign markets is a direct function of its success during the initial network run. If it has a long run on the network, it will probably be quite successful for two reasons: (1) it has a demonstrated audience appeal; and (2) there are a number of episodes available for distribution. This latter factor is extremely important, because it is uneconomical to produce additional episodes once a series has ended its network run. In addition, a television station is much less interested in procuring a series for which there are only 20 or 30 episodes than it is in one which has hundreds of episodes.

In recent years, the three domestic networks have purchased approximately 90 percent of their prime-time entertainment series

[11] See Little[3], p. 109, hereafter referred to as the Little Report.
[12] *Ibid.*

from independent "packagers" of programs.[13] As networks turned to direct licensing of programs from independent suppliers, they obtained in the initial bargaining process rights to a share of the programs' future syndication revenues as well as interests in the revenues which might be generated by any exploitation of copyrighted matter from these programs in the sale of merchandise. Our primary interest lies only in syndication revenues, however, since merchandising revenues are less than 5 percent of the syndication yield.

It is crucial to understand that network syndication interests have always been obtained during the initial bargaining process between the program supplier and the network. Before the program series reaches the network, an agreement is reached between the network company and the supplier as to the price which the network will pay for each episode in the series, the price to be paid for repeat episodes on the network, and the shares of syndication rights and profit shares to be retained by the network, as well as a myriad of other matters such as allowances for unexpected cost increases in producing the programs, escalator clauses for subsequent seasons, the division of merchandising interests, penalties to be paid in case of network cancellation of the series, and technical details concerning delivery of episodes to the network. In most cases, the network obtains the rights to the network exhibition of the program series for five years.

The rights to distribute program episodes to domestic television stations after the initial network run and to foreign stations during and after network exhibition are referred to as domestic and foreign syndication rights. The right to share in the net revenues from syndication—equal to total revenues less distribution costs, entertainment guild royalties, and other costs—is referred to as a profit share, and this share is usually identical for domestic and foreign revenues. Prior to the 1970 Prime Time Rule, the initial contract between network and packager not only allocated the above interests, but it also specified the precise distribution fee to be charged by the distributor. These fees ranged from 10 percent to 45 percent, the larger fees being exacted for the smaller sales. In addition, networks often agreed to allow packagers to recoup excess production costs from the networks' profit shares.

While the syndication market is not highly concentrated, one may not assume that syndication rights and profit shares are not valuable. The fee stipulated in the original network-packager contract may be sufficiently large to compensate the distributor more than amply for his costs of distribution. Moreover, the actual costs incurred in distribution are very small since the episodes have already been produced. Only shipping, print, and other miscellaneous costs such as royalty payments to members of entertainment guilds are deducted from the revenues which remain after imposition of the distributor's fee. Thus, syndication revenues are an important contributor to net profits even if they are small in comparison with the original network payments for the programs.

According to available data,[14] networks obtained the syndica-

[13] *Ibid.*, p. 5.
[14] *Ibid.*, p. 46. The FCC Office of Network Study also collects these data.

tion rights in one-fourth to slightly more than one-third of their prime-time programs from 1957 through 1968. This proportion reached its maximum in 1964—35 percent for domestic distribution rights and 35.7 percent for foreign rights—but it declined steadily to 25.9 percent for both in 1968.[15] The networks' share of actual syndication sales was estimated at 22 percent of the domestic market and 29 percent of the foreign market for 1967, the most recent year for which data are available.[16] Although neither datum is likely to indicate substantial market power, the FCC's Prime Time Rule has imposed a total prohibition upon network distribution in domestic syndication markets. As we shall see, this decision was motivated as much by the FCC's fear of network monopsony power as by its concern about undue concentration in syndication.

3. The FCC rule

In 1965, the FCC issued a *Notice of Proposed Rule-Making*[17] which sought to prohibit: (1) all domestic syndication (distribution) by network companies; (2) network ownership of syndication profit shares in programs produced wholly or in part by others; and (3) foreign syndication by the networks of programs produced wholly or in part by others. In 1970, these provisions formally adopted by the Commission in its Prime Time Rule, whose principal thrust is to limit the number of hours of prime-time network broadcasting in the nation's largest 50 markets.[18]

Why should the FCC act to prohibit network purchase of these rights from packagers? Even if it fears monopoly control over domestic syndication, is it necessary to prohibit networks from buying even a minority interest in the profits from syndication? Prohibition of network distribution might be warranted, but it is surprising that the Commission has chosen to limit suppliers' right to sell profit shares in their productions.

A reading of both the Proposed Rule and the Prime Time Rule reveals that the Commission believes that it is not restricting suppliers' prerogatives but rather protecting these packagers from the monopsony power of the networks. By prohibiting the networks from bargaining for syndication profit shares and distribution rights, the Commission is reserving these lucrative privileges for the suppliers. The Commission reasons that the networks have been utilizing their monopsony power to bid these profits away from suppliers at little or no compensation. As a result, program producers were courting bankruptcy, and causing a threat to the continuance of many sources of program supply. The Commission's implicit theory of network-producer bargaining may be inferred from various statements appearing in the *Notice of Proposed Rule-Making*. For instance, it is claimed that:[19]

> . . . network corporations - usually as a *quid pro quo* for initial financing but sometimes as compensation for assumption of the risk of sale to advertisers - . . . seek and frequently obtain . . . the right to distribute the programs or series in domestic syndication and foreign markets; the right to share . . . in the profits from domestic and foreign syndication sales . . . .

[15] *Ibid*

[16] (Percentages of off-network sales only.) *Ibid.*, pp. 108-9.

[17] [8]

[18] See [9].

[19] [8], p. 8.

But these rights were being ceded unwillingly by producers, since in earlier years:[20]

> [t]hese rights usually were retained by independent producers and constituted valuable commercial assets which contributed to their economic stability and viability. The importance of the retention of these rights to the financial stability of independent producers is supported by testimony of producers that in many, if not most, instances they do not recover their initial production costs from the network run . . . but must look to syndication and foreign sales to 'make them whole' and to show a profit.

There can be little doubt that the Commission believed that its Proposed Rule would save independent producers from network exploitation, for the Commission stated:[21]

> . . . [i]t is our hope that the proposed rule would reduce the possibility that independent producers may be *forced* to give up rights in their programs in order to obtain access to network time. . . .

What did not occur to the Commission is the possibility that independent producers "gave up" rights in their programs because networks offered to buy them. The Prime Time Rule allows networks to sell the rights in the programs which they produce for themselves, but ignores the possibility that transfers of rights in the other direction are equally compensated. This is not an unusual posture for a regulatory agency which finds itself enmeshed in transactions between very large and very small firms. It is a common regulatory notion that large firms exploit the smaller firms simply because they are larger, but more often than not this theory does not stand up to careful scrutiny.

The alternative theory which is tested below is very simple. It is merely that networks purchase ancillary rights in programs exhibited originally on their networks at prices which reflect *ex ante* expectations of their discounted present value. If a network wishes to invest in either syndication rights or profit shares, it must compensate the supplying company through correspondingly higher initial prices for episodes of the program which are shown on the network. Therefore, program prices to the networks should vary directly with the magnitude of their syndication interests in each.

4. A model of network programming

It is impossible to posit program-supply function without also addressing the problem of network rivalry and network-supplier negotiations for residual rights. The value of a program is directly related to its ability to attract audiences, but actual audience is inversely related to the strength of competing programs at the same hour. Moreover, the number of viewers attracted to a program will vary systematically throughout the day and even during prime time. Finally, we shall argue that the network is more likely to invest in residual rights of less valuable programs than in the rights for more expensive programs, and this investment decision must be incorporated into the empirical model of the next section.

In this paper, we address ourselves to the determinants of the

[20] *Ibid.*, p. 7.

[21] *Ibid.*, p. 19. Emphasis supplied

cost of regularly scheduled new prime-time entertainment series. These series appear sporadically throughout the year as each network discards shows which fail to attract a substantial share of the prime-time audience, but most changes are made at regular intervals of approximately 13 weeks. The largest number of changes occur in the fall and winter, and our sample mainly includes programs which appeared for the first time in the fall of the years 1960 through 1965.

Negotiations for a new series may begin as much as one or two years before a program appears on a network, and it is rare for the lag to be less than six months. At this time, a formal contract or a memorandum of agreement will be drawn up between the supplier and the network. In fact, some of these important details may be omitted until a later date as both parties abide by an informal understanding. Therefore, in most cases, the prices to be paid by the network are stipulated considerably in advance of the network's decision to schedule the program or even order a single episode, and the value of the program series must be determined *a priori* without any definite notion of the nature of the competition which the program will face when it is finally exhibited.

Once the program series is actually ordered, the network begins to search for the appropriate prime-time hour for its exhibition. Approximately 60 to 70 percent of the shows in the rival two networks' schedules will be continuations of last season's series, and these rivals will be reluctant to move continuing series regardless of the new series chosen by the network to appear opposite them. Thus, for the most part, each network will choose to replace its series failures under the assumption that rivals will not move most of their more successful shows in response. We have, therefore, the basis for a "Cournot" theory of programming, where each network takes its rivals' choices as given in attempting to maximize its profits.

Our Cournot model of network triopoly is exposited in terms of a single time period within prime time. The inputs for the ith network's program will be denoted t_{ij}, referring to the number of units of the jth input into the ith network's program. For the first network, for example, there exists a "production function" of the form

$$A_1 = A_1(t_{11}, \ldots, t_{1M}; t_{21}, \ldots, t_{2M}; t_{31}, \ldots, t_{3M}), \; j = 1, \ldots, M, \quad (1)$$

where A_1 represents the audience potential of the first network's program. The inputs to this production function include the services of cameras, settings, film, or tape, and a number of other goods as well as the services of all technical and creative persons involved in "producing" an audience through the creation of a given program. The precise relationship between each of these productive services and the audience yield of the program is extremely difficult to specify empirically; therefore, the analysis is delineated in terms of heterogeneous inputs only for pedagogical purposes in this section. A more detailed elaboration of the Cournot model is undertaken in Section 7 below.

The network sells viewers to advertisers at a price, P_A, and therefore faces a net profit (II) function:

$$\Pi = P_A A_1 - \sum_{j=1}^{M} p_j t_{1j}, \quad (2)$$

where p_j is the market price of the jth input. Its problem is to choose the t_{1j}'s which maximize (2). This requires that for each t_{1j}:

$$\left[P_A + \frac{dP_A}{dA_1} A_1\right]\left[\frac{\partial A_1}{\partial t_{1j}} + \sum_{j=1}^{M}\left(\frac{\partial A_1}{\partial t_{2j}} \cdot \frac{dt_{2j}}{dt_{1j}}\right) + \sum_{j=1}^{M}\left(\frac{\partial A_1}{\partial t_{3j}} \cdot \frac{dt_{3j}}{dt_{1j}}\right)\right] = \left[p_j + \frac{\partial p_j}{\partial t_{1j}} t_{1j}\right]. \quad (3)$$

The first bracket on the left-hand side of (3) is simply marginal revenue (of audience) facing the network. The second bracket has three terms: the first is the marginal product of the t_{1j} and the next two terms are conjectural response terms for the other two networks. In our Cournot model, the conjectural response terms are equal to zero, thus simplifying the algebra and the analysis considerably. The term on the right-hand side is simply the marginal cost of the jth input.

Under Cournot assumptions, the conjectural response terms in (3) disappear, and we are left with

$$\left[\frac{\eta - 1}{\eta}\right] P_A \frac{\partial A_1}{\partial t_{1j}} = p_j, \quad j = 1, \ldots, M, \quad (4)$$

$$\left[\frac{\delta_j + 1}{\delta_j}\right]$$

where η represents the price elasticity of advertising demand facing the network and δ_j is the elasticity of supply of the jth factor to the network. We shall simply denote $(\delta_j + 1)/\delta_j$ by k_j hereafter.

Equation (4) is the first-order condition for the employment of each of the M inputs. Solved for each t_{1j}, it represents a variety of a Cournot reaction curve since it is obvious that $\partial A_1/\partial t_{1j}$ varies with the strength of rival networks' fare. Specifically, it is likely that $\partial^2 A_1/\partial t_{1j}\partial t_{2j}$ and $\partial^2 A_1/\partial t_{1j}\partial t_{3j}$ are negative, implying that networks will "counter-program," placing their more expensive programs opposite the rivals' weakest fare and vice versa.

While (4) holds for any type of input, the mechanism by which it is achieved varies across different varieties of program inputs. For nonreproducible talent or "stars", $\partial A_1/\partial t_{1j}$ should be replaced by a discrete term reflecting the increment to audience attributable to the performer. Moreover, given that the network may only choose whether to employ the performer or not, t_{1j} may not assume values other than zero or unity. It is p_j which varies to satisfy (4) in this case, and as long as this price is above the performer's opportunity cost in other media, he will offer his services to program packagers.

For the other inputs, the network varies t_{1j} according to the magnitude of the marginal productivity term, the price of network advertising, and its monopoly and monopsony power in the respective markets. In practice, however, many nontalent inputs to the production process are used in fixed proportions either because of the nature of the production function or union agreements. For instance, the amount of lighting, the number of technicians,

the number of feet of film or videotape, the amount of stage space required, the editing of the film or tape, and numerous other production services are not utilized in significantly variable proportions. Nevertheless, the prices of these services are likely to contain considerable economic rent, since bargaining agents may press for higher wages for the suppliers of the services as their marginal revenue products [according to (4)] rise. But these prices should vary with the average profitability of all entertainment fare in a given year. Thus we expect some nontalent costs to be fixed while others vary with the strength of demand for network advertising.

A simple manipulation of (4) allows us to summarize our model by distinguishing between the rents paid to talent and the prices earned by nontalent inputs. If we assume that the first K of the M inputs are talent, total payments to talent for the first network run (C_t) may be written

$$C_t = \frac{\eta - 1}{\eta}\left[\sum_{j=1}^{K} k_j \frac{\partial A_1^*}{\partial t_{1j}} \cdot \frac{1}{A_1^*}\right] P_A A_1^*, \qquad (5)$$

where A_1^* is the expected audience of the given program and $(\partial A_1^*/\partial t_{1j})(1/A_1^*)$ is the elasticity of expected audience with respect to the jth talent input. Similarly, nontalent costs (C_m) may be written

$$C_m = C_0 + \frac{\eta - 1}{\eta}\left[\sum_{j=K+1}^{M} k_j \frac{\partial A_1}{\partial t_{1j}} \cdot \frac{t_{1j}}{\bar{A}_1}\right] P_A \bar{A}_1, \qquad (6)$$

where $\bar{A}$ is the average audience for network programs in the current year and C_0 represents fixed costs which do not vary with the net revenues from the sale of entertainment programming.

5. The empirical estimation of program costs

☒ The previous two sections have led us to hypothesize that the cost of any program to a network will vary with the anticipated audience of that program, the average revenue yield of programs in network exploitation, and the residual rights obtained by the network. The basic equation to be estimated from available data is of the form

$$C_i = a_0 + a_1(P_A \bar{A}_i) + a_2(P_A A_i^*) + a_3 n_i D_i + a_4 n_i S_i + u_i. \qquad (7)$$

where C_i is the cost per exhibition of the ith program, A_i^* is its expected audience, D_i is a dummy variable which is equal to unity if the network obtains the distribution right for syndication of the program and zero otherwise, and S_i is the profit share from syndication obtained by the network. Both S_i and D_i are multiplied by n_i, the proportion of exhibitions represented by first runs, since the value of syndication interests is directly proportional to the number of episodes filmed. A randomly distributed error term with zero mean and constant variance is denoted u_i.

The magnitude of the coefficients of a_1 and a_2 in (7) will depend upon the relative importance of nontalent and talent expenditures in total program costs and the degree of monopoly or monopsony power exercised by the networks in their output and input markets [see equations (5) and (6)]. If either $(\eta - 1)/\eta$ or the k_j differ sub-

stantially from unity, the networks will be paying inputs to the production process less than the value of their marginal product, and a_1 and a_2 will be correspondingly smaller than they would be if the networks were perfect competitors in all markets. Similarly, if a_3 and a_4 are found to be smaller than the discounted present value of accounting returns from syndication, we may infer that the networks possess monopsony power in dealing with their suppliers.

☐ **The data.** Data for new regularly scheduled entertainment series on the three networks in the fall seasons of 1960 through 1965 were obtained from the contracts signed by the networks. In all, contracts for 148 program series were available, and of these 148, complete data were available for 121 series.[22]

The cost datum, C_i, is an estimate of the average cost of one half hour of a single episode in its first exposure on the network. In order to obtain this estimate, it is assumed that the network would schedule 52 episodes during a year by purchasing the maximum number of new episodes possible and filling out the year with repeats. Since repeats generally bring audiences of only 70 percent of new episodes, the total cost of 52 weeks of the series is divided by the sum of the number of new episodes plus 0.7 times the number of repeats required.[23]

As an estimate of $P_A \bar{A}_i$, the total estimated network night-time sales to advertisers for each year is utilized. Since the number of networks and the number of prime-time hours per week did not vary from 1960 through 1965, these industry sales serve well as a proxy for the average revenues per hour during each of the six years studied.

The estimate of *expected* revenues per program, $P_A A_i^*$, was obtained by asking each network to provide its initial price for a single commercial minute of advertising in each series during its fall season. An attempt was made to obtain the prices offered by the networks before advertisers began placing their orders. This set of prices provides the earliest recorded estimates of the networks' own expectations concerning the revenue potential of their programs.

Measures of D_i and S_i are taken directly from the contracts with suppliers. D_i is a set equal to unity if the network owns either the domestic distribution right or the foreign right or both. S_i is equal to the proportion of net profits from foreign and domestic syndication granted to the network company by the contract.

[22] For 19 of these programs, there was no record in the network files of the initial asking price for commercial minutes. For 8 others, it was impossible to obtain a precise cost estimate.

[23] In addition, an adjustment in C_i is made for network investment in a pilot and for "overage" agreements. It is assumed that any pilot program is utilized as an episode in the series and the cost of the pilot is included in the cost of a year's run of the series. Overage payments are network rebates of cost overruns which are remitted from the network's syndication profit share. Approximately one third of network programs earn profits from syndication, therefore, the net value of the overage agreement to the supplier is assumed to equal one-third times the load to overruns specified in the contract, which, in turn, is usually 5 or 10 percent of stipulated program costs.

In the empirical analysis below, two additional series are used. A variable indicating the average strength of programs scheduled by the two rival companies at the same hour, A_t^r, is constructed by averaging the percentage of total television homes watching each rival program in the preceding year.[24] If the rival program is new during the current season, its strength is measured by multiplying the average performance of that network's programs by 0.9, an arbitrary weight designed to reflect a lower probability of audience acceptance. Another variable, H, measures the total homes normally watching television during the specific hour of the week during which the program is scheduled.

☐ **Regression results.** Equation (7) was fitted to data for the entire 121-program sample and for a 108-program subsample which excludes all music variety programs. The exclusion of these programs is based upon an *a priori* judgment that the values of a_3 and a_4 are likely to be much smaller for such fare given the rapid obsolescence of popular music, and that relative production costs for this type of programming are quite different from the costs of other series. Both samples were also utilized to fit a variant of (7) in which the time trend, T_t, was substituted for $P_A\bar{A}_t$ in order to determine if the latter was merely capturing the trend of general cost inflation during 1960–1965. The results demonstrate that $P_A\bar{A}_t$ serves as a better regressor in the program cost equation, but the difference is not statistically significant.

The ordinary least-squares estimate of (7) for both samples is satisfactory, with one glaring exception. The coefficient of the syndication profit share variable is negative and significant, suggesting that networks pay less for programs in which they obtain profit shares. See Table 1. This counterintuitive result derives from

TABLE 1

ORDINARY LEAST-SQUARES ESTIMATES OF PROGRAM COSTS (EQUATION 7)

REGRESSION	SAMPLE SIZE	ESTIMATED COEFFICIENTS FOR THE INDEPENDENT VARIABLES*						
		CONSTANT	$P_A\bar{A}$	P_AA^r	D	S	T	R^2
(i)	121	12,304 (2.42)	0.21864 (3.82)	0.18467 (5.57)	664 (0.48)	−7474 (2.03)		0.410
(ii)	108	16,608 (4.30)	0.25918 (5.81)	0.60271 (3.56)	2403.1 (2.30)	−6880.3 (2.31)		0.448
(iii)	121	27,500 (8.33)		0.18669 (5.54)	662.44 (0.45)	−7384.5 (2.00)	1128.5 (3.75)	0.409
(iv)	108	35,119 (13.07)		0.09134 (3.39)	2482.4 (2.29)	−6710.7 (2.24)	1330.9 (5.66)	0.440

* t STATISTICS IN PARENTHESES.

MEAN $P_A\bar{A}$ = $90,000

MEAN P_AA^r = $98,611 FOR 121-PROGRAM SAMPLE; $97,065 FOR 108-PROGRAM SAMPLE (BASED UPON 0.85 TIMES THE ASKING PRICE FOR THREE COMMERCIAL MINUTES IN EACH PROGRAM)

SOURCE OF MEAN $P_A\bar{A}$: LITTLE REPORT [3] P. 85

[24] This series is simply last year's Nielsen rating for continuing shows.

the networks' tendency to purchase larger shares in the less expensive programs with lower audience appeal. It is not perfectly clear why this pattern should exist, but an explanation may be attempted. The networks tend to place the weakest of their new programs opposite their rivals' strongest returning series; therefore, program suppliers are less interested in retaining profit shares in these shows, since they are aware that low-cost series are less likely to survive on the networks than more expensive shows. Given that a program series must have a fairly long network run to accumulate sufficient episodes to make syndication profitable, program suppliers may be less interested in retaining syndication interests in any series with relatively low probability success on the network.

It thus becomes necessary to estimate (7) as part of a simultaneous equation system which includes a profit-share investment function. Unfortunately, not many exogenous variables recommend themselves for such an equation, since there is no obvious *a priori* theory which predicts the outcome of negotiations for these subsidiary rights. The following simple linear form is utilized for the purposes of this investigation:

$$S_t = b_0N_t^a + b_1N_t^c + b_2N_t^n + b_3R_t + b_4C_t + b_5T_t + v_t. \quad (8)$$

The N_t variables are dummies for each of the three networks, A.B.C., N.B.C., and C.B.S., respectively. R_t is a dummy variable equal to unity if the program is an hour series and zero if it is a half-hour series. This variable is included simply because the networks tended to procure profit shares in hour series more than in half-hour series during our sample period. A time trend, T_t, is included to capture the response of the networks to increasing FCC concern about network ownership of profit shares during the period.

When (7) is estimated by two-stage least squares utilizing all exogenous variables in (7) and (8) in the first stage, a very large value for a_4, the coefficient of S, results. An examination of the residuals reveals that the relationship is misspecified. The expected value of a program is measured by its anticipated revenues for a given competitive situation, but if networks systematically place their weaker fare against the rivals' strongest programs and vice versa, $P_A\bar{A}^r$ does not measure the value of each program for a given competitive situation. Put another way, this variable does not reflect the value of specialized inputs in attracting audience under invariant conditions. It cannot be expected that a star performer will accept a lower rent in performing in a program which is to be sacrificed before another network's most popular series.

In order to adjust P_AA^r for the effect of network rivalry, this variable is multiplied by the square root of A_t^r,[25] the average

[25] Expected revenues are multiplied by the *square root* of the average of rivals' program ratings for the past year because a log-linear regression of *ex post* audience upon program cost, rivals' program ratings from last year, A^r, and television homes watching at the given hour, H, yielded a coefficient for A^r of approximately 0.5. Equation (7) was also estimated with $R_t^r = (p_AA_t^r)(A_t^r)$, but the results were little different from those in Table 2. The proportion of explained variance fell very slightly, and the value of $a_3 + a_4$ was reduced by approximately 20 percent.

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audience appeal of other network programs appearing during the same time period. But including A^r in equation (7) introduces a further complication, since we expect the cost of a program to vary *directly* with the value of $P_A A^r (A^r)^{0.5}$ but we also expect each network to schedule its most expensive programs opposite its rivals' least successful series. Thus we expect the scheduling decision to find C varying *inversely* with A^r. In order to avoid biased estimates of (7), we must introduce equation (9) to reflect the scheduling decision for each program. This scheduling relationship includes each of the network dummy variables as well as H_i, a measure of the number of households normally watching television during the time period in which the ith program is scheduled.

Our complete model may now be written as follows:

$$C_i = a_0 + a_1(P_A\bar{A})_i + a_2R_i^r + a_3n_iD_i + a_4n_iS_i + u_i \qquad (7')$$

$$S_i = b_0N_i^r + b_1N_i^t + b_2N_i^n + b_3R_i + b_4C_i + b_5T_i + v_i \qquad (8)$$

$$C_i = c_0N_i^r + c_1N_i^t + c_2N_i^n + c_3H_i + c_4A_i^r + w_i, \qquad (9)$$

where R_i^r is equal to $(P_A A_i^r)(A_i^r)^{0.5}$ and u_i, v_i, and w_i are random disturbance terms with zero mean and constant variance. There are three endogenous variables, C_i, A_i^r, and S_i, in a simultaneous system of three equations.

Estimates of the parameters of (7') are obtained by the method of two-stage least squares. Reduced-form estimates of A_i^r and S_i are first obtained by ordinary least-squares regressions of each variable upon all exogenous variables. The reduced form estimates of R_i^r and n_iS_i are then obtained by regressing each on all exogenous variables and the corresponding transformation of each variable's reduced form. The second-stage estimates of (7') are presented in Table 2, along with approximate t statistics and coefficients of multiple determination.

TABLE 2

TWO-STAGE LEAST-SQUARES ESTIMATE OF PROGRAM COSTS (EQUATION 7')

REGRESSION	SAMPLE SIZE	ESTIMATED COEFFICIENTS FOR THE INDEPENDENT VARIABLES*					
		CONSTANT	$P_A\bar{A}$	R^r	D	S	R^2
(v)	121	15,923 (2.783)	0.18224 (3.069)	0.16172 (5.710)	1250.9 (0.7627)	741.6 (0.05240)	0.418
(vi)	108	15,900 (3.601)	0.21328 (3.620)	0.10270 (3.297)	1893.8 (1.493)	12,285 (1.412)	0.295

*t STATISTICS IN PARENTHESES.

As expected, the regression for the smaller sample is quite different from the one which includes observations on music-variety programs, and the large differences in the values of the coefficients of $P_A\bar{A}$ and R^r support our assertion that the ratio of talent to other production costs varies substantially between music-variety and all other program types. Regression (vi) provides an estimate of the combined value of the distribution right and a 100-percent share of profits from syndication of $1,894 plus $12,285 times the mean value of n(0.788), or $11,031 per new half-hour episode of entertainment programming. The sum of the

coefficients of these variables is equal to 1.7 times the standard error of the sum. Expressed as a percentage of mean program costs for the period, these syndication interests amount to 23 percent of network program costs or 19 percent of the total value of network exhibition and syndication interests. These results are compared with published estimates of syndication profits in Section 6.

Of equal interest is the low value of the constant term in regressions (v) and (vi), suggesting that only $16,000 of the costs of an average half-hour program were not price determined during the period. The relative importance of the other two terms can best be explained by evaluating them at the point of means of the regression. The mean value of program costs is $48,725 per half-hour for the larger sample and $48,328 for the smaller sample. The mean value of D and S is approximately 0.22 in each sample. For the smaller sample, therefore, the net cost of the network exhibition alone is $48,328 − 0.22(14,179) = $45,209.

For the entire 108-program sample, the mean value of the networks' expected revenue per half hour ($P_A A^r$) is $97,965. Therefore, a_2R^r may be estimated at $10,045 at the point of means, or 22 percent of total program costs. Our theory leads us to assign all of these costs to talent expenses, but we have only informal evidence that such an allocation is justified. The Little Report found that by 1964 above-the-line costs had risen to approximately 48 percent of total costs. These expenditures include payments for actors, directors, producers, and other personnel. We have no further data on the division of program costs in commercial broadcasting in the United States, but it is interesting to compare the Little datum with data for a foreign noncommercial network operating in competition with a single commercial network.[24] For 1964–1965, above-the-line costs for this foreign network represented 44 percent of total program costs for entertainment programming. Expenditures for performing artists were 22 percent of total costs, or precisely the same as the value of a_2R^r in regression (vi) above.

At the midpoint of the sample period, average network revenues per half hour ($P_A\bar{A}$) were approximately $90,000. Thus, at the point of means, $a_1P_A\bar{A}$ is equal to $19,200 in regression (vi) or 42.5 percent of network program costs. This component of costs represents the price-determined payments to program inputs which do not vary across programs within a single year. Our theory leads us to assign these payments to the price-determined elements of nontalent costs, but we cannot identify with precision the recipients of such payments.

6. The value of syndication interests

■ The regression results presented in Table 2 provide an estimate of the value of distribution rights and profit-share income from syndication of 19 percent of network program outlays in 1960–1965. Can this estimate be reconciled with published data on the actual returns from syndication? A comparison with the Little

[24] This network has kindly provided detailed data on its program costs which are utilized in Section 7. At the request of the network, its identity is not revealed in this paper.

Report data provides the only available answer to this problem.

In a 1967 prospectus,[27] Twentieth Century-Fox reported that:

> [c]ommencing with the television series produced in 1964, . . . [production costs] are being amortized in the proportion that any year's actual net revenue bears to the estimate of total net revenue expected to be realized from networks and syndication distribution. This change . . . has resulted in the amortization of approximately 80 per cent of production cost of films released each year against television network revenue.

Fox is among the largest suppliers of prime-time series, and there is no reason to believe that its experience is not representative of the entire industry. As a check on this estimate, it is useful to compare the data in the Little Report on network program payments and total program payments to suppliers and their own production subsidiaries of $290.3 million for prime-time series in 1964, and total "off network" syndication sales of $78 million in the same year.[28] Sales were 27 percent of prime-time program costs in 1964. This may be a misleading comparison, however, since syndication revenues follow network program payments by the networks in the same series with a mean lag of perhaps one or two years. In 1965–1966, the average flow of syndication sales from old network series was $89.4 million, or 31 percent of 1964 program payments by networks.[29] Some of these sales may have come from series not originally shown on the networks during prime time, but it is unlikely that there was a large contribution from this source. It seems reasonable, therefore, to assume that the ratio of syndication sales to networks' prime-time program costs was 0.30 in 1964.

The network data appearing in the Little Report show that new series cost the networks about $125,000 per hour episode in 1964, an average which was rising at an annual rate of approximately 7 percent at the time.[30] Since at least one-third of network prime-time series are new to the network in a typical year, it seems reasonable to assume that the average cost per new episode shown on the networks during prime time in 1964 was $110,000 per hour. But the networks license programs for more than one exhibition. Therefore, we require data on the payments for repeats as well as new exhibitions.

Once more the Little Report provides the necessary data. In 1964, the networks paid $290.3 million for prime-time entertainment series. Given 71½ hours of such programming per week,[31] the average cost per hour may be estimated at $78,000. During 1964–1965, the networks exhibited original episodes for most series from mid-September until mid-April, filling out the remainder of the season with repeat episodes. Thus, original episodes formed 7/12 of the season's offering for an average program, and the ratio of the cost of new episodes to total program payments may be estimated at 7/12 ($110,000/$78,000), or 0.82. Given that syndication revenues are 30 percent of total network program payments, they are 0.30 divided by 0.82 of new program costs (C) for the first run of the programs. The ratio of syndication revenues to program costs is thus 0.366. See Figure 2.

[27] Dated November 22, 1967, p. 8.

[28] See Little Report [3], vol. 2, pp. 130 and 141.

[29] *Ibid.*, p. 141.

[30] This datum is used rather than the mean value from the sample collected for the regressions in Section 5. The latter is not a complete census of all new programs. *Ibid.*, p. 69.

[31] *Ibid.*, p. 5.

FIGURE 2

CALCULATION OF THE VALUE OF SYNDICATION INTERESTS FROM 1964 COST-REVENUE DATA FOR PRIME-TIME ENTERTAINMENT SERIES

$$\frac{\text{SYNDICATION PROFIT}}{\text{NEW EPISODE COST PER HOUR}} = \left[\frac{\text{PROFIT FROM DISTRIBUTION}}{\text{SYNDICATION SALES}} + \frac{\text{PROFITS FROM PROFIT SHARES}}{\text{SYNDICATION SALES}}\right]\left[\frac{\text{SYNDICATION SALES}}{\text{TOTAL NETWORK PROGRAM PAYMENTS}}\right]\left[\frac{\text{TOTAL NETWORK PROGRAM PAYMENTS}}{\text{TOTAL PROGRAM HOURS}}\right]\left[\frac{\text{TOTAL PROGRAM HOURS}}{\text{TOTAL HOURS OF NEW EPISODES}}\right]\left[\frac{1}{\text{COST PER HOUR OF NEW EPISODE}}\right]$$

$$= \left[0.11 + 0.35\right] \cdot \left[\frac{\$87.1\text{ MILLION}}{\$290.3\text{ MILLION}}\right]\left[\frac{\$290.3\text{ MILLION}}{71\tfrac{1}{2} \times 52}\right]\left[\frac{71\tfrac{1}{2} \times 52}{7/12 \times 71\tfrac{1}{2} \times 52}\right]\left[\frac{1}{\$110{,}000}\right]$$

$$= 0.168$$

$$\frac{\text{EXPECTED SYNDICATION PROFIT}}{\text{NEW EPISODE COST PER HOUR}} = \left[1 + \text{EXPECTED RATE OF GROWTH}\right]\left[0.168\right]$$

$$= 1.15 \times 0.168 = 0.193$$

The profitability of syndication may also be inferred from the Little Report's interpretation of network data, but only after some adjustment. The networks report a "net gain" from syndication distribution fees of $2,319,000 and net gains from profit-share income of $5,419,000 in 1964.[32] Estimates of producers' (and presumably other participants') shares in the profits from syndication are estimated in a rather simple fashion in the Little Report. The networks' average profit share in the current year's network series is divided into profit-share net gains for 1964 in order to obtain an estimate of the total profits accruing to all participants. Similarly, the calculation of industry profits from distribution fees is effected by simply dividing the network datum by the share of programs in which networks have obtained the rights for currently exhibited network series. Both estimates must be considered to be biased downward.

In the calculation of industry profit-share net gains, the bias occurs in utilizing the net profit figure for the networks. Our data for new program series in the 1960–1965 period reveal that the network profit shares are inversely correlated with program success and, therefore, syndication profitability. As a result, the Little Report technique of dividing network profit share into network imputations of profits from syndication must lead to an underestimate of industry profits from syndication. We cannot know the magnitude of this downward bias, but the Little Report estimate of $19.5 million of industry profits from this source in 1964—35.8 percent of net revenues after deducting distribution fees[33]—

[32] *Ibid.*, p. 132.

[33] *Ibid.*, p. 130. It is assumed that the average distribution fee is 0.30 and that producers' profit-share income from syndication represents the same share of total profit-share income as for the network companies.

must be adjusted upward. Given that only shipping costs, print costs, production overages, and a few miscellaneous expenses are deducted from net syndication revenues before computing profit shares, it would be surprising if total profit shares did not amount to at least 50 percent of net revenues.

The estimate of industry distribution fees is also too low, as a simple assumption will demonstrate. There is no reason to believe that other distributors are less efficient than the network subsidiaries which realized profit margins of 11.0 percent of sales in 1964. Since industry sales were $78 million, industry profits from distribution fees should approximate $8.58 million, not $6.5 million as estimated by the Little Report.[34]

The network company which was bidding for syndication interests at the midpoint of our sample—the beginning of the 1963 season—could hardly be unaware that syndication profits were growing at a very rapid rate in 1960–1963, a rate of more than 30 percent according to the Little estimates. This company would expect syndication profits to be realized from its successful programs far past 1964; therefore, the simple estimates for 1964 calculated in the above paragraphs are probably considerably below the profits expected by interested parties in 1963. There is no way of knowing what growth rate might have been applied by these bidders, but given an annual rate of growth of syndication sales of 15 to 20 percent[35] and a more rapid rate of growth of profits, it would not seem unreasonable to apply a 15-percent rate to the above profit data.

The final estimate of syndication profitability is derived as follows. Syndication fees contribute 11.0 percent of total sales in net profits while profit-share income adds 0.50 of 70 percent of sales (obtained by deducting 30 percent for average distribution fees). Therefore, 1964 profits from syndication were 0.46 of total sales. Given a growth rate of 0.15 percent, *expected* profits may be assumed to be 0.529 of 1964 *actual* syndication sales. Since syndication sales represent 0.366 of new program costs (C), syndication profits from the distribution fee and a 100 percent profit-share are estimated at 0.529 times 0.366 times new program costs, or 0.193 C for the average program during the midpoint of our sample period. This procedure is depicted schematically in Figure 2.

The final estimate is admittedly rough, relying upon network data in which important cost imputations cannot be known. There is a considerable increase in the estimated profitability of profit shares from that appearing in the Little Report, but all other estimates are quite conservative.

It remains to estimate the *present value* of 0.193 C since syndication revenues are not realized immediately upon payment of program costs, but only after a considerable lag. Since foreign sales may begin immediately and account for nearly 60 percent of all revenues, it seems reasonable to assume that the bulk of syndication revenues may be realized in four years. Again using a conservative estimate, assuming that these revenues are realized evenly over the four-year period and that the opportunity cost of capital in 1963

[34] *Ibid.*

[35] *Ibid.*, p. 141.

1964 was 0.10, the present value of 0.193 C may be calculated as follows:

$$[(0.193\,C)/4]\int_0^4 e^{-rt}\,dt = 0.04825\,C[(1-e^{-0.4})/0.10] = 0.159\ C.$$

A long, tortuous route has brought us to an estimate of the value of syndication profits, which is nearly 16 percent of the price of a new episode of a program series to the networks.

How sensitive are these estimates to the assumptions made along the way? For instance, if the Little data were taken literally, the estimate of the present value of syndication profits would fall to 11.6 percent of new program costs. If all other assumptions were to be retained, an increase in the assumed cost of capital to 15 percent would lower present value from 0.159 to 0.145 C. An assumed growth rate of syndication profits of 20 percent would raise the estimate to 16.6 percent. Only the denial of the assumptions in the Little Report's calculations of industry profits seems of great importance, but this denial seems warranted even though our adjustment is certainly a rough one.

The final accounting estimate of the value of all syndication interests—16 percent of new program costs to the networks—is well within the confidence interval of our econometric estimate of 19 percent (Table 2). It would therefore appear that networks have paid an amount equal to the discounted present value of the distribution rights and profit shares which they have obtained. The Prime Time Rule has not saved the program suppliers from the rapacious tendencies of network buyers, it has simply required the suppliers to assume more risk or to sell these syndication interests to other buyers.

7. An extension of the results

If we extend the theoretical model developed earlier in this paper, we may utilize the regression results along with further empirical analysis to make a rough estimate of the degree of monopoly-monopsony power possessed by the networks.

For instance, suppose that (1) is appropriately represented by (1'):

$$A_1 = \frac{f\left(\sum_{j=1}^{M} t_{1j}\right)}{F\left(\sum_{n=1}^{S}\sum_{j=1}^{M} t_{nj}\right)} \qquad \begin{array}{l} \partial A_1/\partial t_{1j} > 0 \\ \partial A_1/\partial t_{nj} < 0 \\ n \neq 1. \end{array} \qquad (1')$$

If we assume further that $f'(\ ) = F'(\ )$, then:

$$\frac{\partial A_1}{\partial t_{1j}}\cdot\frac{t_{1j}}{A_1} = \frac{f_j'(\ )t_{1j}}{f(\ )}\left[1-\frac{f(\ )}{F(\ )}\right], \qquad (10)$$

where $f_j'(\ )t_{1j}/f(\ )$ is the elasticity of the network's own audience with respect to its own investment in the jth input. If we call this elasticity μ_j, we may insert (10) into (4) to obtain

$$\left|\frac{\eta-1}{\eta}\right|\cdot P_A A_1 \sum_{j=1}^{M} k_j\cdot\mu_j\left[1-\frac{f(\ )}{F(\ )}\right] = \sum_{j=1}^{M}\mu_j t_{1j}. \qquad (11)$$

At Cournot equilibrium, $1 - f(\ )/F(\ )$ becomes $1 - 1/N$, where N is the number of rival networks. If we assume further that all $k_j = k$, we may write the expression for Cournot equilibrium as

$$k\left[\frac{\eta - 1}{\eta}\right]\left[\frac{N - 1}{N}\right]\left[\sum_{j=1}^{M} \mu_j\right][P_A A_1] = \sum_{j=1}^{M} p_j t_{1j}. \qquad (12)$$

For talent inputs alone, this relationship simply states that above-the-line expenditures are equal to the product of the audience expected from the program and the sum of the elasticities of audience with respect to each input multiplied by three terms which reflect the intensity of competition among networks for audience, advertising revenue, and performers. In our regression results of the previous section, the estimate of a_2 is

$$a_2 = k\left[\frac{\eta - 1}{\eta}\right]\left[\frac{N - 1}{N}\right]\left[\sum_{j=1}^{K} \mu_j\right] \approx 0.10.$$

If we could determine the value of the sum of the elasticities, $\sum_{j=1}^{K} \mu_j$, we would be able to estimate the value of $k[\eta - 1/\eta]$ for $N = 3$, the number of networks throughout our sample period.

Unfortunately, we do not have precise data on the distribution of above-the-line and below-the-line costs for our U. S. sample, but the foreign noncommercial data do permit us to attempt to estimate $\sum_{j=1}^{K} \mu_j$. These foreign data contain observations on above-the-line costs, payments to performing artists, and audience for 54 light entertainment and drama series. The light entertainment series—mostly filmed comedy or light drama and music-variety programs—are likely to be chosen to provide the maximum audience per unit cost, but the drama series may well be chosen to satisfy the tastes of a sizeable minority despite the costs involved in their production. For this reason, empirical investigation into cost-audience relationships are likely to be useful only for the light-entertainment series

In order to obtain a measure of $\sum_{j=1}^{K} \mu_j$ from the noncommercial program experience, we estimate two forms of simple regressions of audience upon costs—one which is linear and one which is log-linear.[36] The independent variables are either artists' costs or

[36] The regression of audience upon either component of costs provides us with a direct estimate of the effect of talent inputs upon audience. The linear regression gives us a slope coefficient equal to $\sum_{j=1}^{k}(\partial A/\partial t_j)$ and the loglinear regression yields slope coefficients equal to $\sum_{j=1}^{k} \mu_j$. This result may be proved quite simply. If audience is denoted A and total factor payments of the appropriate category are denoted $\sum_{j=1}^{k} p_j t_j$ and if we assume that $A = \alpha\left[\sum_{j=1}^{k} p_j t_j\right]^{\beta}$, $\partial A/\partial t_j = (\beta A/p_j)\left(\sum_{j=1}^{k} p_j t_j\right)$ and $(\partial A/\partial t_j)(t_j/A) = \beta(p_j t_j)\left(\sum_{j=1}^{k} p_j t_j\right)$. Summing over all K inputs gives $\sum_{j=1}^{k}(\partial A/\partial t_j)(t_j/A) = \beta$. But $\sum_{j=1}^{k} \mu_j = \sum_{j=1}^{k}(\partial A/\partial t_j)(t_j/A)$; therefore, $\sum_{j=1}^{k} \mu_j = \beta$.

all above-the-line costs and the dependent variable is average audience per program. The results are presented in Table 3 for filmed comedy or light drama series and for music-variety series as well for a combination of the two. The final column in Table 3

TABLE 3

ELASTICITY OF AUDIENCE WITH RESPECT TO EXPENDITURES UPON TALENT: FOREIGN NONCOMMERCIAL NETWORK, 1964–1965*

	SAMPLE	CONSTANT TERM	COSTS OF PERFORMING ARTISTS	ABOVE-THE-LINE COSTS	R^2	ESTIMATED ELASTICITY
LINEAR FORM REGRESSION COEFFICIENTS	ALL LIGHT ENTERTAINMENT (n = 29)	3341 (3.02)	1.350 (3.77)		0.346	0.513
		3262 (2.73)		0.7202 (3.51)	0.313	0.533
	FILMED COMEDY AND LIGHT DRAMA (n = 13)	4489 (1.62)	1.089 (1.39)		0.150	0.446
		4034 (1.21)		0.5983 (1.26)	0.130	0.503
	MUSIC–VARIETY PROGRAMS (n = 14)	2846 (2.24)	1.535 (3.26)		0.470	0.537
		2577 (1.94)	1.001 (3.29)		0.475	0.591
LOG LINEAR FORM REGRESSION COEFFICIENTS	FILMED COMEDY LIGHT DRAMA (n = 13)	4.201 (1.70)	0.5846 (1.91)		0.248	0.585
		2.525 (0.78)		0.7202 (1.98)	0.262	0.726
	MUSIC–VARIETY PROGRAMS (n = 14)	3.478 (1.82)	0.0740 (2.63)		0.366	0.674
		3.063 (1.36)		0.0807 (2.42)	0.328	0.601

*t STATISTICS IN PARENTHESES

contains the estimated elasticity of audience with respect to the independent variable at the point of means. These elasticity measures for all above-line costs range from 0.5 to more than 0.7, and we may take 0.6 as an approximation to the mean estimate.

If networks had no monopoly nor monopsony power, $k(\eta - 1)/\eta$ would equal unity. Therefore, if $\sum_{j=1}^{M} \mu_j$ is equal to 0.6, we would expect $[(N - 1)/N] \sum_{j=1}^{M} \mu_j$ to equal 0.4 for a three-network oligopoly. Our econometric estimate of this expression (a_2) is only 0.1; therefore, application of the Cournot model leads us to reject the hypothesis of competition in both markets. While we cannot dismiss the possibility of network monopsony in some input markets, our results in Sections 5 and 6 provide some evidence that k is not likely to differ much from unity. These results suggest that $\eta - 1/\eta$ is approximately equal to 0.25 and that η is equal to 1.33 for each network.

■ If there is a single theme to this paper it is that offhand attempts to connect the fewness in television network broadcasting to theories of monopoly or monopsony behavior are likely to be unsuccessful. Network broadcasting is far from a typical economic activity since its principal output is donated to viewers while advertisers purchase rights to address these viewers with commercial messages. Networks may have monopoly power in national advertising markets, but this market power is not easily identified in output markets since it may only be implemented through a restriction in the number of viewer hours offered to advertisers in any period. It is obvious that this restriction of output is not serious among the current network triopoly, for each firm broadcasts during every hour possible and more than 60 percent of the nation's homes watch this output during prime viewing hours. It is only the FCC—through its imposition of the Prime Time Rule—which has sought to restrict network output to advertisers and viewers alike by limiting prime-time network broadcasting to three hours per day.

Suppose that each of the three networks faces a market demand curve which is much less than infinitely price elastic. Our rather crude estimate of this price elasticity is −1.33 for each firm, an estimate which is certainly inconsistent with the hypothesis of perfect competition in national advertising markets. But what power does this confer upon the networks? Surprisingly, virtually the only effect of this imperfectly competitive situation is to allocate the rents from television broadcasting to the networks and their stations rather than to television celebrities. The size of the total prime-time audience is likely to be rather insensitive to small changes in program quality, and performers are available to the networks in inelastic supply; therefore, the effect of monopoly power in advertising markets is to lower the derived demand for talent used in programs without much change in the nature of those programs. Star performers available at $20,000 per week are also available at a mere $10,000 per week. In our Cournot (competitive) model of program expenditure, monopoly power in advertising markets is simply translated into lower rents for performers.

Obviously, the impact of network monopoly in advertising markets upon program quality depends upon the relative importance of the various types of resources used in producing programs. Our econometric estimates of program costs suggest that as much as two-thirds of all program outlays are directly dependent upon the revenue potential of network programs in their advertising market. We cannot be sure how much of this two-thirds share represents economic rents paid to participants in program production, but fragmentary evidence on the division of program expenditures suggests that a very large share of these price-determined outlays is appropriated by performers and other talent. If there were greater competition in national advertising markets, the derived demand for these services would rise and be reflected in larger economic rents. Profits would be diverted from television networks and their stations to television celebrities.

The FCC has not connected the networks' position in their output markets with their programming behavior, but rather it

8. Summary

has focused upon the networks' possession of *monopsony* power. Its restrictions upon network investment in syndication interests is based upon the assumption that the networks do not pay their suppliers the full value of these syndication rights, an assumption which is not confirmed by the econometric estimates presented in Section 5, above. Comparison of these estimates with accounting returns from syndication markets demonstrates that the networks purchase syndication interests at prices which reflect the present value of net revenues generated in syndication markets. This conclusion should surprise no one outside of the Commission, for it is inconceivable that the networks could force suppliers to accept a rate of return on program investments which is below the opportunity cost of capital. If monopsony power were present, it would be reflected in a reduced quantity of programs ordered for network exhibition, not in exploitation and eventual bankruptcy of program suppliers. Most firms supplying network entertainment series during the past decade are alive and well and still competing for network business.

The results of this paper should not be a discouragement to the FCC. That the Commission is not required to protect the small suppliers of entertainment programs—to a large extent, the major motion picture companies—from the rapacious tendencies of the television networks should be a source of considerable relief. Moreover, the identification of the relationship between network profits and market power in national advertising markets should cause the Commission no concern. The major change which would emanate from the development of greater competition in advertising markets would be a redistribution of profits toward television performers. Clearly, the FCC prefers to see these profits in the hands of the networks and stations where they may be devoted to "public service" programming. Of course, the Commission could consider the possibility of taking the necessary steps to permit an increase in the number of national networks, but this would require a reduction in the subsidies paid to local programs which attract few viewers and a major increase in the popular fare so deprecated by the Commission and its staff.

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1976-77 Network Primetime Season At A Glance

Includes Series Titles (listed alphabetically by network), Time Slots, Suppliers, Production Staff Heads, Cast Regulars and Semi-Regulars and Estimated Production Costs per Segment (costs do not include time charges or commercials)

Series Title	Day	Hr.	Mins.	Supplier	Production Principals	Cast Regulars & Semi-Regulars	Estimated Prod. Fee per Episode
ABC-TV							
ABC Friday Night Movie	Fri	9:00	120	Various			Various
ABC Sunday Night Movie	Sun	9:00	120	Various			Various
Baretta	Wed	9:00	60	Universal TV - Roy Huggins/Public Arts	EP: Anthony Spinner, Leigh Vance P: Charles E. Dismukes	Robert Blake, Ed Grover, Tom Ewell, Michael D. Roberts	$ 350,000
Barney Miller	Thu	8:[illegible]	30	Four D Prods.	EP: Danny Arnold P: Roland Kibbee	Hal Linden, Barbara Barrie, Abe Vigoda, Maxwell Gail, Jack Soo, Ron Glass, James Gregory, Ron Carey, June Gable, Steve Landesberg	175,000
Bionic Woman, The	Wed	8:00	60	Universal TV - Harve Bennett Prods.	EP: Harve Bennett P: Kenneth Johnsen	Lindsay Wagner, Richard Anderson	370,000
Captain & Tennille, The	Mon	8:00	60	Moonlight & Magnolias Inc. - Bob Henry Prods.	EP: Alan Bernard P: Bob Henry D: Tony Charmoli	Daryl Dragon, Toni Tennille	220,000
Charlie's Angels	Wed	10:00	60	Spelling-Goldberg Prods.	EP: Aaron Spelling, Leonard Goldberg P: Rick Husky, David Levinson	Kate Jackson, Farrah Fawcett-Majors, Jaclyn Smith, David Doyle	310,000
Cos	Sun	7:00	60	Jemmin Inc.	P: Chris Beerde D: Jeff Margolis	Bill Cosby, Jeffrey Altman, Tim Thomerson, Marion Ramsey, Buzzy Linhart, Willie Bobo	220,000
Donny & Marie	Fri	8:00	60	Osmond Prods. - Sid & Marty Krofft Prods.	EP: Raymond Katz P: Sid & Marty Krofft D: Art Fisher	Donny & Marie Osmond, Jimmy Osmond, Paul Lynde, The Ice Vanities, Osmond Brothers, Jim Connell, Larry Larsen	230,000
Family	Tue	10:00	60	Spelling-Goldberg Prods.	EP: Aaron Spelling, Leonard Goldberg, Mike Nichols P: Nigel & Carol Evan McKeand	Sada Thompson, James Broderick, Meredith Baxter Birney, Gary Frank, Kristy McNichol, Mary Grace Canfield, Season Hubley	280,000
Happy Days	Tue	8:00	30	Paramount TV - Miller-Milkis Prods.	EP: Garry K. Marshall, Thomas L. Miller, Edward K. Milkis P: Tony Marshall, Jerry Paris D: Jerry Paris	Ron Howard, Henry Winkler, Tom Bosley, Marion Ross, Anson Williams, Donny Most, Erin Moran, Al Molinaro, Roz Kelly	160,000
Holmes & Yoyo	Sat	8:00	30	Universal TV - Heyday Prods.	EP: Leonard B. Stern P: Anne Salten	John Schuck, Richard B. Shull, Bruce Kirby, Andrea Howard	110,000
Laverne & Shirley	Tue	8:30	30	Paramount TV - Miller-Milkis Prods. Henderson Prod. Co.	EP: Garry K. Marshall, Thomas L. Miller, Edward K. Milkis P: Tony Marshall, Mark Rothman, Lowell Ganz	Penny Marshall, Cindy Williams, Phil Foster, Eddie Mekka, David L. Lander, Michael McKean, Betty Garrett, Carol White	160,000

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Exhibit 3
to the Affidavit of
Franklin M. Fisher

1976-77 Network Primetime Season At A Glance

(Continued from page 50)

CBS-TV

Series Title	Day	Hr.	Mins	Supplier	Production Principals	Cast Regulars & Semi-Regulars	Estimated Prod. Fee per Episode
CBS Friday Night Movie	Fri	9:00	120	Various			Various
Delvecchio	Sun	10:00	60	Universal TV - Crescendo Prods.	EP: William Sackheim P: Steven Bochco, Michael Rhodes	Judd Hirsch, Charles Haid, Michael Conrad, Mario Gallo	$300,000
Doc	Sat	8:30	30	MTM Enterprises	EP: Ed. Weinberger, Stan Daniels P: Martin Cohan, Laurence Marks	Barnard Hughes, Audra Lindley, David Ogden Stiers, Ray Vitte, Lisa Mordente, Herbie Faye	[illegible]
Executive Suite	Mon	10:00	60	MGM-TV - Stanley Rubin/Arena Prods.	EP: Norman Felton, Stanley Rubin P: Don Brinkley	Mitchell Ryan, Stephen Elliott, Sharon Acker, Leigh McCloskey, Richard Cox, Gwyda DonHowe, Paul Lambert, Byron Morrow, Trisha Noble, Wendy Phillips, Joan Prather, Madlyn Rhue, Percy Rodrigues, William Smithers, Maxine Stuart, Brenda Sykes, Carl Weintraub	325,000
Good Times	Wed	8:00	30	Norman Lear-Bud Yorkin Tandem Prods.	EP: Allan Manings P: Austin & Irma Kalish D: Gerren Keith	Esther Rolle, Jimmie Walker, Janet DuBois, BernNadette Stanis, Ralph Carter	[illegible]
Hawaii Five-O	Thu	9:00	60	CBS-TV	EP: Philip Leacock P: James Heinz, Douglas Green	Jack Lord, James MacArthur, Kam Fong, Herman Wedemeyer, Harry Endo, Richard Denning, Peggy Sherman, Amanda McBroom	[illegible]
Jeffersons, The	Sat	8:00	30	T.A.T. Communications Co. - NRW Prods.	P: Don Nicholl, Michael Ross, Bernie West D: Jack Shea	Isabel Sanford, Sherman Hemsley, Roxie Roker, Franklin Cover, Damon Evans, Zara Cully, Berlinda Tolbert, Paul Benedict, Marla Gibbs, Ned Wertimer	170,000
Kojak	Sun	[illegible]	60	Universal TV - FRP Prods.	EP: Matthew Rapf P: James McAdams	Telly Savalas, Dan Fraser, Kevin Dobson, George Savalas, Mark Russell, Vince Conti	360,000
Mary Tyler Moore Show, The	Sat	9:00	30	MTM Enterprises	EP: James L. Brooks, Allan Burns P: Ed. Weinberger, Stan Daniels	Mary Tyler Moore, Edward Asner, Murray MacLeod, Ted Knight, Georgia Engel, Betty White	225,000
Mash	Tue	[illegible]	30	20th-Fox TV	EP: Gene Reynolds P: Don Reo & Allan Katz, Burt Metcalfe	Alan Alda, Mike Farrell, Harry Morgan, Loretta Swit, Larry Linville, Jamie Farr, William Christopher	[illegible]
Maude	Mon	9:00	30	Norman Lear-Bud Yorkin Tandem Prods.	EP: Rod Parker, Hal Cooper P: Charlie Hauck D: Hal Cooper	Beatrice Arthur, Bill Macy, Adrienne Barbeau, Conrad Bain, Rue McClanahan, Angela Buddeley, Brian Morrison, J. Pat O'Malley	190,000
One Day At A Time	Tue	9:30	30	T.A.T. Communications Co.-Allwhit Inc.	EP: Jack Elinson, Norman Paul P: Perry Grant, Dick Bensfield D: Herbert Kenwith	Bonnie Franklin, Mackenzie Phillips, Richard Masur, Pat Harrington, Valerie Bertinelli, Mary Louise Wilson	160,000
Phyllis	Mon	8:30	30	MTM Enterprises	P: Ed. Weinberger, Stan Daniels	Cloris Leachman, Henry Jones, Jane Rose, Judith Lowry, Garn Stephens, John Lawlor, Carmine Caridi, Lisa Gerritsen, Burt Mustin	170,000
Mr. T & Tina	Sat	8:30	30	Komack Co.	EP: James Komack P: Bob Carroll Jr., Madelyn Davis, Gary Shimokawa	Pat Morita, Susan Blanchard, June Angela, Gene Protanato, Pat Suzuki, Jerry Fujikawa, Miriam Byrd Nethery, Ted Lange	[illegible]
Most Wanted	Sat	10:00	60	QM Prods.	EP: Quinn Martin, John Wilder, Paul King P: Harold Gast	Robert Stack, Shelly Novack, Jo Ann Harris	320,000
Nancy Walker Show, The	Thu	9:30	30	T.A.T. Communications Co.	EP: Rod Parker P: Arnie Rosen, Jerry Davis D: Dennis Steinmetz	Nancy Walker, William Daniels, Ken Olfson, Beverly Archer, Sparky Marcus, James Cromwell	133,000
NFL Monday Night Football	Mon	9:00	120+	ABC Sports	EP: Roone Arledge P: Don Ohlmeyer D: Chet Forte	Frank Gifford, Howard Cosell, Alex Karras	400,000
Rich Man, Poor Man-Book II	Tue	9:00	60	Universal TV	EP: Michael Gleason P: Jon Epstein	Peter Strauss, Gregg Henry, James Carroll Jordan, Susan Sullivan, Ray Milland, Kay Lenz, William Smith, Tim McIntyre, Dick Sargent, Herbert Jefferson Jr.	323,000
Six Million Dollar Man, The	Sun	8:00	60	Universal TV - Harve Bennett Prods.	EP: Harve Bennett P: Lionel E. Siegel, Allan Balter	Lee Majors, Richard Anderson, Martin E. Brooks	370,000
Starsky & Hutch	Sat	9:00	60	Spelling-Goldberg Prods.	EP: Aaron Spelling, Leonard Goldberg P: Joseph T. Naar	David Soul, Paul Michael Glaser, Antonio Fargas, Bernie Hamilton	340,000
Streets Of San Francisco, The	Thu	10:00	60	QM Prods.	EP: Quinn Martin P: William Robert Yates	Karl Malden, Richard Hatch, Darleen Carr	350,000
Tony Randall Show, The	Thu	9:00	30	MTM Enterprises	P: Tom Patchett, Jay Tarses	Tony Randall, Rachel Roberts, Barney Martin, Allyn Ann McLerie, Devon Scott, Brad Savage	150,000
Welcome Back, Kotter	Thu	8:00	30	Komack Co.-Wolper Prods.	EP: James Komack P: Eric Cohen, George Yanok	Gabriel Kaplan, Marcia Strassman, John Sylvester White, Robert Hegyes, Lawrence-Hilton Jacobs, Ron Palillo, John Travolta	[illegible]

CBS-TV

All In The Family	Wed	9:00	30	Norman Lear-Bud Yorkin Tandem Prods.	EP: Mort Lachman P: Milt Josefberg D: Paul Bogart	Carroll O'Connor, Jean Stapleton, Rob Reiner, Sally Struthers, Vinnette Carroll	225,000
All's Fair	Mon	9:30	30	T.A.T. Communications Co.	EP: Rod Parker P: Bob Schiller, Bob Weiskopf D: Bob Claver	Richard Crenna, Bernadette Peters, J.A. Preston, Judy Kahan, Lee Chamberlin, Jack Dodson	125,000
Alice	Wed	9:30	30	Warner Bros. TV	EP: Thomas G. Kuhn, William P. D'Angelo, Harvey Bullock, Ray Allen P: Bruce Johnson	Linda Lavin, Philip McKeon, Vic Tayback, Beth Howland, Polly Holliday	110,000
Ball Four	Wed	[illegible]	30	CBS-TV	P: Don Segall	Jim Bouton, Jack Somack, David-James Carroll, Ben Davidson, Bill McCutcheon, Lenny Schultz, Marco St. John, Jaime Tirelli, Sam Wright	110,000
Barnaby Jones	Thu	10:00	60	QM Prods.	EP: Quinn Martin P: Philip Saltzman	Buddy Ebsen, Lee Meriwether, Mark Shera, John Carter	320,000
Blue Knight, The	Wed	10:00	60	Lorimar Prods.	EP: Lee Rich, Philip Capice P: Robert Schitt	George Kennedy, John Steadman	300,000
Bob Newhart Show, The	Sat	9:30	30	MTM Enterprises	EP: Tom Patchett, Jay Tarses P: Michael Zinberg, Gordon & Lynn Farr	Bob Newhart, Suzanne Pleshette, Peter Bonerz, Bill Daily, Marcia Wallace, Pat Finley, Will Mackenzie, Jack Riley	290,000
Carol Burnett Show, The	Sat	10:00	60	Punkin Prods.	EP: Joe Hamilton P: Ed Simmons D: Dave Powers	Carol Burnett, Harvey Korman, Vicki Lawrence, Tim Conway, Lester Flatt Dancers	280,000

(Continued on page 62)

1976-77 Network Primetime Season At A Glance

(Continued from page 52)

NBC-TV

Series Title	Day	Hr.	Mins.	Supplier	Production Principals	Cast Regulars & Semi-Regulars	Estimated Prod. Fee per Episode
(Quincy)				Universal TV-Glen A. Larson Prods.	EP: Glen A. Larson P: Lou Shaw	Jack Klugman, Garry Walberg, Lynnette Mettey, John S. Ragin, Robert Ito, Joseph Roman, Val Bisoglio	
Police Story	Tue	10:00	60	Columbia Pictures TV-David Gerber Prods.	EP: David Gerber P: Liam O'Brien	Scott Brady, Dane Clark	$350,000
Police Woman	Tue	9:00	60	Columbia Pictures TV-David Gerber Prods.	EP: David Gerber P: Douglas Benton	Angie Dickinson, Earl Holliman, Ed Bernard, Charlie Dierkop	360,000
Practice, The	Wed	8:00	30	Danny Thomas Prods.-MGM-TV	EP: Paul Junger Witt P: Ron Rubin	Danny Thomas, David Spielberg, Dena Dietrich, Shelley Fabares, Didi Conn, Mike Evans, Allen Price, Damon Raskin	160,000
Quest, The	Wed	10:00	60	Columbia Pictures TV-David Gerber Prods.	EP: David Gerber P: Mark Rodgers, James H. Brown	Kurt Russell, Tim Matheson	280,000
Rockford Files, The	Fri	9:00	60	Universal TV-Cherokee Prods.-Roy Huggins/Public Arts	EP: Meta Rosenberg P: David Chase, Charles Floyd Johnson	James Garner, Noah Beery, Joe Santos, Stuart Margolin, Gretchen Corbett	365,000
Sanford & Son	Fri	8:00	30	Norman Lear-Bud Yorkin Tandem Prods.	EP: Bud Yorkin P: Saul Turteltaub, Bernie Orenstein D: Alan Rafkin	Redd Foxx, Demond Wilson, LaWanda Page, Don Bexley, Nathaniel Taylor, Hal Williams	220,000
Serpico	Fri	10:00	60	Paramount TV-Emmet Lavery Jr. Prods.	EP: Emmet Lavery Jr. P: Don Ingalls, Barry Oringer	David Birney, Tom Atkins	320,000
Van Dyke & Company	Thu	10:00	60	Catspaw Prods.-Blye-Einstein Prods.	EP: Byron Paul P: Allan Blye, Bob Einstein D: John Moffitt	Dick Van Dyke, The L.A. Mime Company, Andy Kaufman, Marilyn Sokol	240,000
Wonderful World Of Disney, The	Sun	7:00	60	Walt Disney Prods.	EP: Ron Miller		385,000

Abbreviations: EP - Exec Producer; P - Producer; D - Director; SP - Supervising Producer; EIC - Exec In Charge

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Rhoda	Mon	8:30	30	MTM Enterprises	EP: James L. Brooks, Allan Burns P: David Davis, Charlotte Brown	Valerie Harper, David Groh, Anne Meara, Julie Kavner, L. Music	180,000
60 Minutes	Sun	7:00	60	CBS News	EP: Don Hewitt SP: Palmer Williams D: Arthur Bloom	Mike Wallace, Morley Safer, Dan Rather, Shana Alexander, James J. Kilpatrick	200,000
Sonny & Cher Show, The	Sun	8:00	60	Apis Prods.-Yongestreet Entertainment	EP: Nick Vanoff P: Frank Peppiatt, Phil Hahn D: Tim Kiley	Sonny Bono, Cher Allman, Chastity Bono, Shields & Yarnell	240,000
Spencer's Pilots	Fri	8:00	60	CBS-TV	EP: Edward H. Feldman, Bob Sweeney P: Larry Rosen	Christopher Stone, Todd Susman, Gene Evans, Margaret Impert, Britt Leach	290,000
Switch	Tue	10:00	60	Universal TV	EP: Matthew Rapf P: Jack Laird	Robert Wagner, Eddie Albert, Charlie Callas, Sharon Gless	340,000
Tony Orlando & Dawn Rainbow Hour, The	Tue	8:00	60	Ilson-Chambers Prods.-Yellow Ribbon Prods.	P: Saul Ilson, Ernest Chambers D: Bill Foster	Tony Orlando, Joyce Vincent Wilson, Telma Hopkins, George Carlin, Bob Holt, Susan Lanier, Jimmy Martinez, Edie McClurg, Nancy Steen	240,000
Waltons, The	Thu	8:00	60	Lorimar Prods.	EP: Lee Rich, Earl Hamner P: Andy White	Richard Thomas, Ralph Waite, Michael Learned, Ellen Corby, Will Geer, Judy Norton Taylor, Mary McDonough, Jon Walmsley, Eric Scott, David W. Harper, Kami Cotler, Joe Conley, Ronnie Claire Edwards	320,000

NBC-TV

63a

Baa Baa Black Sheep	Tue	8:00	60	Universal TV	EP: Stephen J. Cannell P: Philip DeGuere Jr.	Robert Conrad, Dana Elcar, James Whitmore Jr., Dirk Blocker, Robert Ginty, W.K. Stratton	[illegible]
Best Sellers	Thu	9:00	60	Universal TV	EIC: Charles Engel		325,000
Big Event, The	Sun	9:30	90	Various	EIC: Alvin Cooperman		Various
Chico & The Man	Fri	8:30	30	Komack Co.-Wolper Prods.	EP: James Komack P: Michael Morris D: Jack Donohue	Jack Albertson, Freddie Prinze, Della Reese, Scatman Crothers	180,000
Emergency	Sat	8:00	30	Universal TV-Mark VII Ltd.	EP: R.A. Cinader	Robert Fuller, Julie London, Bobby Troup, Randolph Mantooth, Kevin Tighe, Tim Donnelly, Michael Norell, Mike Stoker, Marco Lopez	[illegible]
Gemini Man	Thu	8:00	60	Universal TV-Harve Bennett Prods.	EP: Harve Bennett P: Leslie Stevens, Robert F. O'Neill, Frank Telford	Ben Murphy, William Sylvester, Katherine Crawford	[illegible]
Little House On The Prairie, The	Mon	8:00	60	NBC-TV-Ed Friendly	EP: Michael Landon P: John Hawkins	Michael Landon, Karen Grassle, Melissa Gilbert, Melissa Sue Anderson, Victor French, Lindsay & Sidney Green Bush, Dabbs Greer, Richard Bull, Katherine MacGregor, Alison Arngrim, Kevin Hagen	320,000
NBC Monday Night At The Movies	Mon	9:00	120	Various			Various
NBC Movie Of The Week	Wed	8:00	90	Various			Various
NBC Saturday Night At The Movies	Sat	9:00	120	Various			Various
NBC Sunday Mystery Movie	Sun	8:30	90	Universal TV			500,000
(Columbo)				Universal TV	P: Everett Chambers	Peter Falk	
(McCloud)				Universal TV-Glen A. Larson Prods.	EP: Glen A. Larson P: Ronald G. Satlof	Dennis Weaver, J.D. Cannon, Terry Carter, Ken Lynch, Sidney Chute, Ken Scott	
(McMillan)				Universal TV-Heyday Prods.	EP: Leonard B. Stern P: Jon Epstein	Rock Hudson, John Schuck, Martha Raye, Richard Gilliland	

(Continued on page 54)

APPENDIX B

AFFIDAVIT OF RICHARD A. POSNER

STATE OF ILLINOIS,)
) ss.:
COUNTY OF COOK,)

RICHARD A. POSNER, being duly sworn, deposes and says:

I am a Professor of Law at the University of Chicago Law School, specializing in antitrust law. My curriculum vitae, including a list of the books and articles I have written, is annexed hereto as Exhibit 1. Counsel for CBS Inc. has asked me to examine the proposed consent decree in United States v. National Broadcasting Company, Inc. (Civil Action No. 74-3601-RJK, C.D. Cal.), together with the other documents filed in the case, including the Justice Department's Competitive Impact Statement ("CIS"), with a view to advising whether the decree is consistent with the "public interest", the standard governing entry of antitrust consent decrees under the Antitrust Penalties and Procedure Act ("APPA"), 15 U.S.C. § 16. My conclusion is that the proposed decree is inconsistent with the public interest as expressed by the Sherman Act.

The legislative history of the APPA makes clear that the purpose of the Act is to bar the entry of antitrust

consent decrees that do not advance the policy of the antitrust laws, which is to promote competition. "The primary focus of the Department's enforcement policy should be to obtain a judgment--whether litigated or consensual--which protects the public by insuring healthy competition in the future". S. Rep. No. 93-298, 93d Cong., 1st Ses. 6 (1973). The proposed consent decree in NBC will not insure "healthy competition"; on the contrary, it is an anticompetitive decree.

I.

The main thrust of the decree is to limit the rights (e.g., to a later syndication of the program) that NBC may acquire from a producer of programs. The value of such rights tends to be highly uncertain; hence the effect of contracts that transfer these rights to the network is to have the network assume the risk that the program will not be successful enough to make the various secondary or residual rights in it commercially valuable. This shifting of risk from producer to network is a boon for the small producer, who may be in no position financially to assume the risks of failure involved in retaining all of the rights to subsequent exploitation of the program. The effect of the proposed consent decree, if adopted, would be to force this risk back on to the producer. That can only weaken the position of the small

producer in a market where the major sellers are large producers. Such a result would be antithetical to the policy of the antitrust laws.

The proposed decree is further anticompetitive in limiting the program production by NBC itself. NBC is a small factor in the program production market (certainly small relative to its principal supplier, MCA), but its competitive potential is significant and presumably helps keep the independent producers "on their toes". They know that if they try to cartelize the market NBC can step in and satisfy a major part of its programming needs internally. The Supreme Court has repeatedly emphasized the importance of preserving potential competition in concentrated markets. See, e.g., United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964). And the Ninth Circuit in a recent case specifically indicated its disfavor for provisions in antitrust decrees limiting production by a potential competitor. See Calnetics Corp. v. Volkswagen of America, 532 F.2d 674, 693-94 (1976).

The entry of an antitrust decree having such serious anticompetitive features as I have outlined, without any effort at responsible justification by the government in its CIS, would flout the purposes of the APPA. And there is

still another consideration that suggests to me that the decree is not in the public interest: its "regulatory" character, which the government acknowledges in its CIS (p. 9). The entry of a regulatory decree is almost a sure sign that the case should never have been brought. The purpose of the antitrust laws is to promote free competition by dissolving restraints of trade and not, as in the proposed decree in this case, to supervise the details of bargaining between buyers and sellers. See Posner, Antitrust: Cases, Economic Notes, and Other Materials 563-65 (1974); Posner, "A Statistical Study of Antitrust Enforcement", 13 J. Law & Econ. 365, 386, 388 (1970). Apart from the unsuitableness of regulatory decrees in the implementation of a statute designed to promote competition as an alternative to regulation, such decrees impose unreasonable burdens on the time and expertise of the federal district courts, which become charged--as will be true in this case if the proposed decree is entered--with the detailed supervision of ongoing commercial relationships.

II.

The proposed decree in its present form is I think manifestly contrary to the statutory standard. But its deficiencies are not mere matters of wording or the inclusion of this rather than that provision. The decree seems based on a legal theory that has no basis in the antitrust laws.

The government needs to rethink the whole case.

The basic premise of the decree is that NBC has combined with the television stations comprising the NBC television network to suppress competition in the production of prime time television programs carried on the network, or alternatively that NBC has monopolized this programming. The government's CIS states that NBC has "used and continues to use its dominance and control over access to the broadcasting time of the NBC Television Network, to condition independent program suppliers' access to said network upon the suppliers' relinquishing valuable rights and interests in their programs", and that NBC "has favored programs in which it obtained such rights and interests over other programs" (p. 6). While recognizing that NBC itself produces only a minute fraction of the prime time entertainment programs broadcast over its network, the government also expresses concern "that NBC's unrestricted ability to produce prime time television entertainment programming" has unlawfully restricted "independent program suppliers' ability to produce and negotiate for distribution and exhibition of their programming". Id.

It seems plain from the language quoted above, the terms of the decree, and the government's earlier filings in

the network cases that the government's theory of how NBC and the other two major networks have reduced competition in the production of television programs is simply that they have driven an unconscionably hard bargain with the producers--or, as the government put it in its memorandum in opposition to CBS's motion for summary judgment, that the networks failed to give the producer "payment commensurate with the success of his program" (p. 20), thereby inflicting "undue hardship" on the producers (p. 10). This theory of the violation that the proposed consent decree is designed to rectify lacks a basis in either common sense or antitrust law. Why would the networks wish to eliminate competition among their program suppliers? A rational network would take every step possible to maximize such competition in order to keep down the prices of programs it buys. Of course the networks want to pay as little for programs as possible--that is why they want to promote rather than to stifle competition among the producers.

Firms may want to reduce competition in the markets in which they sell, but they have absolutely no interest in reducing competition among their suppliers, thereby possibly placing themselves at the mercy of a cartel of suppliers or a monopoly supplier. The proposed decree is thus premised on

a completely unrealistic conception of network self-interest. Further, in seeking to rectify an alleged inequality of bargaining power between producers and networks that has allegedly enabled the networks to drive an unconscionably hard bargain with the producers, the decree strays outside the recognized boundaries of the antitrust laws. No antitrust cause of action is stated by an allegation that a buyer has refused to pay a fair price to a seller. The antitrust laws--unlike the Uniform Commercial Code or the Automobile Dealers Day in Court Act--have never before been thought to provide a remedy for a seller to whom a buyer pays an unconscionably low price. A one-sided sales contract is simply not a restraint of trade.

It should be emphasized that the contractual provisions between NBC and the producers about which the government complains are simply provisions allocating the various profit opportunities created by the contract between the parties to it in a way that may be less favorable to the supplier than alternative provisions would be. For example, the government complains about the practice, prohibited by the FCC since 1971, whereby NBC received not only the right to show the program on its network but also shared in the revenues from subsequent broadcasts of the program by independent television stations. In effect, that practice simply reduced the price that NBC paid the producer for network exhibition--and as I have said there is nothing in the antitrust laws that gives a seller the right to complain about the price in his contract with the buyer. To treat a contract of sale as an unreasonable restraint of trade because the advantages of the contract appear to inure primarily to the benefit of the seller rather than the buyer, or of the buyer rather rather than the seller, would be to alter fundamentally the character of the antitrust laws and cast a cloud of suspicion over virtually all sales contracts.

I have said this is a case, utterly unprecedented in antitrust jurisprudence, in which the gravamen of the complaint is that the buyer has driven a hard bargain with his sellers. The character of the case as I have described it would not be altered by the allegations that NBC has monopoly power even if those allegations had any possible basis in fact. The offense of monopolization is defined in the Supreme Court's most recent formulation (see United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)) as monopoly power plus exclusionary practices, i.e., practices designed to punish, destroy, or intimidate a competitor or potential competitior of the

monopolist. I know of no case where charging customers high prices, or paying suppliers low prices, has itself been deemed an act of monopolization.

In any event, it is plain as a matter of law that NBC does not have monopoly power. The government concedes that the programs broadcast on the NBC network compete for viewers' and therefore advertisers' patronage with the programs shown on the other two networks (not to mention the programs shown on the many independent television stations). Since each of the television networks carries approximately the same amount of prime time programming as the others, it follows that NBC purchases at most one-third of the programming at issue in this case. A firm that purchases only one-third of a product can under no accepted judicial doctrine be deemed a monopolist.

The government appears to concede this, but argues that the NBC television network is itself a relevant market somehow separable from the broader market for prime time network television. This approach is untenable. To fragment a market into the individual outputs of each of the sellers, or the purchases of each of the buyers, in the market is to make every firm a monopolist and to expand enormously the

reach of Section 2 of the Sherman Act. Hence the courts have consistently held that the "natural monopoly" that the producer has over his own output is not the kind of monopoly with which Section 2 is concerned. See, e.g., United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 392-94 (1956); Telex Corp. v. International Business Machines Corp., 510 F.2d 894, 917-19 (10th Cir. 1975); ALW, Inc. v. United Airlines, Inc., 510 F.2d 52, 55-57 (9th Cir. 1975); Bushie v. Stenocord Corp., 460 F.2d 116, 120-21 (9th Cir. 1972). That principle applies a fortiori to a case where the firms in question, CBS, NBC, and ABC, are purchasing from a common pool of program suppliers who can sell to any one of the networks. The differences among the programming carried by the three networks seem to be even smaller than those which distinguish, say, Chevrolet and Ford automobiles--different brands recognized to be in the same product market, even though General Motors and Ford have sought to differentiate their products in minor but significant ways. See, e.g., Mogul v. General Motors Corp., 391 F. Supp. 1305, 1313 (E.D. Pa. 1975), aff'd, 527 F.2d 645 (3d Cir. 1976); Merit Motors, Inc. v. Chrysler Corp., 417 F. Supp. 263, 269 (D.D.C. 1976). In contrast, very few viewers, simply by looking at a television program, could tell whether it was a CBS, an NBC

or an ABC program.

It is true that once the network has signed a contract with the producer for a particular program idea, the contract will usually obligate the producer to offer the completed program to the network. But this is to say that the relevant competition among the networks for programming occurs at the point at which the producer has come up with an idea for a program that he thinks is marketable. He can peddle his program idea to any of the three networks. Their competition for promising program ideas assures that none of the networks has a monopoly in the purchase of programming.

The facts I have recited to show that this case and the proposed decree have no relation to the objectives of antitrust policy, which are to prevent monopoly and foster competition, are not in dispute. The government claims it can also prove the allegedly improper purpose of each defendant in using its control over access to its network to force the program suppliers to give up certain interests in their programs. But the only improper purpose suggested is that each defendant deliberately uses whatever bargaining power it may have to drive a hard bargain, one that involves annexing to itself as many of the profit opportunities created by the

program in question as it can. And, as I have emphasized, the use of individual bargaining power to minimize the cost of program acquisition, while conceivably objectionable on other social grounds, raises no question of illegality under the antitrust laws.

Nor is anything significant added to the case by the fact that the programs offered by the networks are carried by a large number of affiliated stations or that the networks produce some television entertainment programs themselves. The existence of station affiliations and of some internal production by the networks does not change the antitrust issues. That NBC owns some stations and has affiliation agreements with others adds nothing to a complaint that NBC is not paying enough to the independent television producers. Ford Motor Company sells its automobiles to the public through a system of franchised dealers, most of whom purchase exclusively from Ford. But a supplier of steel to Ford could not on that account complain under the antitrust laws that Ford was not paying him a high enough price to keep him in business. There is simply no right under the antitrust laws to demand a "reasonable" price from a supplier; the buyer's distribution system is irrelevant. This case involving the market for programs would be no

different if NBC owned all of its affiliated stations. NBC might be stronger as a buyer of television programs, but it would still not have a monopoly position in the relevant market--the market in which it competes with ABC and CBS in the purchase of programs--and its contracts with its suppliers would still not be reviewable by an antitrust court for adequacy of consideration.

Equally irrelevant is the fact that NBC produces some of the entertainment programming shown on its network (though less than 5 percent of it). One can imagine an antitrust case whose gravamen was that NBC had a monoply in one market (program distribution) which it was using to take over a related market (program production). But that is not this case. Not only is the premise (monopoly in one market) false, but NBC's small market share as a producer refutes any suggestion that it has been seeking to take over the production of all of its own programs. Moreover, even if NBC produced all of its own programming, its market share as a producer would be no higher than its current market share as a buyer. Since it is not claimed that ABC and CBS could be compelled to buy their programs from NBC, its market share as a producer cannot be more than approximately one-third. But, if NBC cannot produce more than one-third of the total

programs, it cannot be deemed a monopolist of production any more than it can be deemed a monopoly buyer. Presumably the complaint is that NBC is trying to depress the profitability of the independent producer industry in order to increase its own network profits, and not in order to increase its own market share in the production of network programming.

NBC's affiliation agreements and its internal production are red herrings in this case. The Government here is challenging the terms on which NBC buys television programs. The Government claims these terms are too hard, impose undue hardships on the independent producers and have impaired the vigor of competition among them. These allegations are irrelevant to the antitrust claims. NBC has very good commercial reasons for wanting to have a large number of suppliers vigorously competing for NBC's business, but NBC has no duty under the antitrust laws to pay a supplier a price that will keep him in business. Relatively inefficient suppliers when faced with competition from other producers offering similar products at lower prices may indeed be driven out of business. But that is the result of competition and not the suppression of competition. The antitrust laws were enacted for "the protection of competition, not competitors". Brown Shoe Co. v. United States, 370

U.S. 294, 320 (1962).

My point is not that the government's case against NBC has legal infirmities; that would not be decisive on the question whether this Court should enter a consent decree. My point is rather that the case is so devoid of even a colorable claim of an antitrust violation that a decree based on the theory of the complaint cannot be deemed "in the public interest", even if the defendant, for whatever private reasons it may have, is inclined to accept the decree rather than litigate. The Antitrust Penalties and Procedure Act requires this Court to make an independent judgment whether the proposed decree is in the public interest. To be in the public interest under the Act a decree must be, at the very least, reasonably related to the policy of the antitrust laws. The proposed decree, even if it could somehow be purged of the anticompetitive features discussed at the outset, would not be reasonably related to the policy of those laws.

[SEAL: Gladys Fuller,
Notary Public,
Cook County, Ill.]

Richard A. Posner
Richard A. Posner

Sworn to before me this
23rd day of February 1977.

Gladys Fuller
Notary Public

Exhibit 1
to the Affidavit of
Richard A. Posner

February 1977
University of Chicago Law School
1111 East 60th Street
Chicago, Illinois 60637

Richard A. Posner

CURRICULUM VITAE

Education:	A.B., Yale College, 1959, summa cum laude; LLB., Harvard Law School, 1962, magna cum laude and Fay Diploma (first in class); President, Harvard Law Review
Occupation:	Law Clerk to Mr. Justice William J. Brennan, Jr, U.S. Supreme Court (1962-1963)
	Assistant to Commissioner Philip Elman, Federal Trade Commission (1963-1965)
	Assistant to the Solicitor General of the United States (1965-1967)
	General Counsel, President's Task Force on Communications Policy (1967-1968)
	Assistant Professor of Law, Stanford Law School (1968-1969)
	Professor of Law, University of Chicago Law School (since 1969)
Other Activities:	Senior Research Associate, National Bureau of Economic Research (1971-1976)
	Senior Research Staff, National Bureau of Economic Research (since 1976)
	Editor, Journal of Legal Studies (since 1972)
	Member, President's Task Force on Competition and Productivity (1969); American Bar Association's Commission to Study the FTC (1969)

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APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 77-53
43947

In the Matter of	)	
	)	
Commercial Television Network	)	DOCKET NO. 21049
Practices and the Ability	)	(RM-2749)
of Station Licensees to	)	
Serve the Public Interest	)	

NOTICE OF INQUIRY

Adopted: January 14, 1977 Released: January 14, 1977

By the Commission: Commissioners Lee and Hooks concurring in the result; Commissioner Fogarty issuing a separate statement.

1. Notice is hereby given of the institution of an inquiry into commercial television network practices and policies regarding the acquisition and distribution of television programming. Almost two decades have elapsed since the Commission completed its last overall study of network practices.1/ Developments in recent years suggest that a new inquiry is warranted.

2. This inquiry will encompass a number of subjects surrounding the matter of alleged dominance of the nation's commercial television industry by the three major commercial networks, but will focus most specifically on the relationship between these networks and their affiliated stations. In this regard, the Commission has consistently emphasized that it is the individual licensee who has the right and the responsibility to program his station:

> ...the Commission in administering the Act and the Courts in interpreting it, have consistently maintained that responsibility for the selection and presentation of broadcast material

1/ Between 1955 and 1957, a special network study staff conducted a broad-ranging inquiry into network practices. This study resulted in the release of the "Barrow Report." Network Broadcasting, H. Rep. No. 1297, 85th Cong., 2nd Sess. (1958). (Hereinafter cited as the "Barrow Report.")

ultimately devolves upon the individual station licensee and that fulfillment of such responsibility requires the free exercise of his independent judgment.

En Banc Programming Policy Report, 20 R.R. 1901, 1911 (1960). It is clear, furthermore, that this responsibility for the independent exercise of programming judgment cannot be delegated to a network or to any other entity or individual.2/ Accordingly, we propose to carefully examine whether particular network practices may improperly compromise or restrict the programming discretion of the broadcast station licensee.

3. In giving proper consideration to this question, it is not possible to limit our inquiry simply to an examination of the contractual relations which exist directly between a network and its affiliated stations. The networks play a central role in our commercial television industry and their activities have a direct bearing on the entire market relating to the production and distribution of television entertainment programming. Station discretion can be meaningfully and effectively exercised only in circumstances where this market is in a healthy, competitive state and is in a position to offer alternative sources of programming. For this reason, our inquiry will encompass the question of whether the networks have maintained anticompetitive policies which unduly restrict the development of other programming sources.

Preliminary Observations

4. This study is prompted, in part, by a rulemaking petition brought before us by Westinghouse Broadcasting Company, Inc. (RM-2749) and by allegations contained in antitrust complaints which the Department of Justice filed

2/ As also stated in the Programming Policy Report (20 R.R. 1901, 1914), the broadcaster is obligated to provide programming to meet the needs and interests of his local community and this "is a duty personal to the licensee and may not be avoided by delegation of responsibility to others." See also Broadcast Licensees and Public Agreement, 57 FCC 2d 42, 49-51 (1975).

against the networks in the Central District of California.3/ The Westinghouse petition called for a "comprehensive inquiry and rulemaking proceeding to review the changing role and function of the three national television networks." Westinghouse Petition in RM-2749, September 3, 1976, p. 1. The Justice Department filed comments in support of this petition but, in a supplemental letter, emphasized that its comments "should not be construed as suggesting that the inquiry encompass those issues now being litigated in the Federal District Court in California," and that neither this letter nor the Department's formal comments were intended "to preclude either the Commission or the Department of Justice from taking any action consistent with its respective responsibilities." Letter from the Honorable Donald I. Baker, Assistant Attorney General, Antitrust Division, December 3, 1976, pp. 1 and 2.

5. We would like to make it clear that, in instituting the present inquiry, we have neither the power nor the desire to foreclose the Department in its antitrust action. While it is inevitable that thorough inquiry into network practices will encompass many of the questions raised in the antitrust suit, we do not believe that our inquiry should in any way preclude the Department from prosecuting its case or from arranging an appropriate settlement. See United States v. Radio Corporation of America, 358 U.S. 334 (1958). In concurrently examining similar issues, the Department of Justice has a direct responsibility for the enforcement of the Sherman Act, whereas the Commission's inquiry will focus on public interest questions affecting communications policy pursuant to our responsibilities under the Communications Act of 1934. In this connection, we note that in mid-November 1976 a proposed consent decree was agreed to by the Department and by NBC in one of the three antitrust actions mentioned (Case No. 74-3601 - RJK), and is now pending before the Federal District Judge handling the case. See 41 Fed. Reg. 51991 (November 24, 1976). This is discussed below, in connection with the general subject of network-producer relationships.

3/ United States v. American Broadcasting Companies, Inc., Civil Action No. 74-3600 - RJK (C.D. Cal.); United States v. CBS Inc., Civil Action No. 74-3599 - RJK (C.D. Cal.); United States v. National Broadcasting Company, Inc., Civil Action No. 74-3601 - RJK (C.D. Cal.).

6. In the discussion of specific topics below, there is extensive reference to allegations raised in the Westinghouse petition, statements in response to that petition filed by public interest groups and other parties, the Department of Justice antitrust complaints, and the proposed NBC consent decree. The networks vigorously oppose most of these allegations, as to their relevance and materiality and in some cases their accuracy. They also advance counter-arguments, both in respects mentioned below and otherwise. We have carefully considered the networks' positions, just as we have carefully noted assertions made by Westinghouse, the Department of Justice, and public interest groups. Given the networks' highly important role in the commercial television industry, allegations regarding abuses of power, and the lapse of 20 years since the last overall network study and investigation, we believe that this Inquiry is appropriate at the present time. This is true not only in connection with consideration of possible Commission regulation by rule or adjudication, but also in connection with possible legislative recommendations to Congress. The Commission hastens to point out, however, that we have not reached any conclusions, even of a tentative nature, regarding those issues discussed below. What we contemplate at this time is solely a fact gathering inquiry designed to provide the Commission with information necessary to a thorough understanding of television networking.

7. The Commission is, of course, cognizant of the vital contributions which the networks have made to the development of the television medium. As pointed out in the 1960 Program Policy Statement, supra, (20 R.R. 1914):

> The programs provided first by "chains" of stations and then by networks has always been recognized by this Commission as of great value to the station licensee in providing a well-rounded community service. The importance of network programs need not be reemphasized as they have constituted an integral part of the well-rounded program service provided by the broadcast business in most communities.

While it is certainly not our intention to adopt any regulatory measures which would impair the ability of the networks to serve the public interest, we must assure ourselves that the networks are not engaging in practices which might unduly encroach on the discretion of our licensees, or unnecessarily restrict the development of new sources of television programming.

8. As a matter of convenience, this Notice has been divided into three sections: (1) background on the role of the networks; (2) questions concerning the relationship between networks and their affiliated stations; and (3) questions concerning the relationships between the networks and program producers and suppliers. It is obvious, of course, that the categories of questions concerning network-affiliate relations and network-program supplier relations are far from being mutually exclusive. Developments in one area can and generally do impact on the other. Nevertheless, we believe that this division of questions will be useful for the purposes of discussion and inquiry. Commenting parties should be careful, however, to keep in mind the fact that to a very large extent these categories are inextricably intertwined. The fact that we are studying various particular aspects of commercial television broadcasting does not mean that these are viewed as problem areas. It simply means that information pertaining to these activities is indispensable to a thorough understanding of network practices. In this regard, our inquiry addresses the identification of problems, not the consideration of possible remedies for any abuses that may be identified.

Background: The Role of the Networks

9. Ever since the demise of the Dumont Network in the mid-1950's, there have been only three "national" television networks: the American Broadcasting Companies, Inc. (ABC), Columbia Broadcasting System, Inc. (CBS) and National Broadcasting Company, Inc. (NBC). Recent years have witnessed the development of a number of specialized networks offering sports or movies, but the pre-eminent position of the three national networks remains unchallenged. Their affiliates number well over 75% of all U.S. commercial television stations (approximately 600 out of slightly more than 700) and, outside the major markets, network affiliation is virtually indispensable to successful station operations.4/ As discussed below, it appears that about sixty percent of the broadcast programs currently presented by affiliates are supplied directly by their network. In addition to their ability to reach nearly all American households through their affiliated stations, all three networks own VHF stations in each of the nation's three largest television markets (New York, Los Angeles and Chicago), and two in other major markets (ABC, Detroit and San Francisco, the 6th and 7th markets; CBS, Philadelphia and St. Louis, the 4th and 12th markets; and NBC, Cleveland and Washington, the 8th and 9th markets). Each of these 5-station "owned and operated" (O and O) groups reaches about 22 percent of the

4/ There are only ten commercial independent stations (in the conterminous U.S.) outside the top 50 markets.

U.S. audience.5/ The networks are actively involved as brokers or middlemen connecting the program producers and national advertisers with local stations and their viewers. It is, therefore, not surprising that the networks play a very important role in the development, selection, and distribution of television programming.

10. This role, with respect to program development and selection, has not remained unchanged. Twenty years ago, more than half of the programs carried by the networks were either produced or purchased by major advertisers who acquired the necessary amount of network time to broadcast their programs. Today, for a variety of economic reasons, virtually all regularly scheduled network programs are either obtained by the networks directly from an independent producer or produced by themselves. With this development, the ability to determine what types of television programming will be made available to the American public has largely shifted from the advertising community to the networks.

11. This change is largely attributable to increases in the costs of producing programming as well as the costs of network advertising time. Between 1960 and 1976, the average cost of a single half-hour episode of a new prime-time program increased by about 237 percent from nearly $49,000 to approximately $165,000.6/ Network program expenditures reflected this trend, rising from $376,948,000 in 1960 to $1,273,241,000 in 1975, an increase of 238 percent. The average cost of a thirty-second network tv advertising spot rose by 153 percent during the same period. Cost increases have also been accompanied by a general recognition that shorter commercial messages are, for the most part, more cost effective than longer tv advertisements. That is, a 20 or 30-second spot, in many instances, is thought to be as nearly effective as a 60-second spot besides being less expensive. Given these developments, it is not

5/ In terms of "ADI households" (households located in the market stations' "area of dominant influence") the figure was 22.82% for ABC, 22.76% for CBS and 21.91% for NBC. See Broadcasting Yearbook 1976, p. B-80, American Research Bureau (ARB) estimates for 1975-76.

6/ The average cost of a prime time network episode was obtained from Arthur D. Little, Television Program Production, Procurement, Distribution and Scheduling, (April 21, 1969) p. 41. Production costs are based on individual program production fees published in Variety, September 15, 1976, pp. 50-54.

surprising that advertisers have become increasingly inclined to spread their commercials over a larger number of programs. Consequently, they no longer produce their own regularly scheduled programming but, rather, purchase a number of commercial spots which are usually placed in a variety of programs. While this development has shifted almost exclusive control over the development and selection of programs to the networks, it has also permitted more businesses, particularly smaller ones, to use television as an advertising medium.

12. Network control over access to the medium has also coincided with rather extraordinary increases in profits. Between 1960 and 1975, total combined network expenditures rose from $461 million to $1,465 million, for an average annual increase of 13.6 percent. Total net broadcast revenues, on the other hand, increased more rapidly; from $495 million in 1960 to $1,673 million in 1975, which was equivalent to an average annual increase of 15 percent. Net income (total combined profits before taxes) earned by the networks has risen at an annual rate of 32 percent; increasing from $33.6 million in 1960 to $203 million in 1975. According to the Internal Revenue Service, pre-tax profits accruing to all businesses in the United States increased at an average annual rate of approximately 12 percent between 1960 and 1974.7/

13. Westinghouse alleges that increases in network profits have partially resulted from expanded program schedules and relative reductions in station compensation payments. It is stated that between 1960 and 1976 the networks increased the length of their program schedules from 434 to 516 half-hours, or by 19 percent.8/ It is further argued that these

7/ According to the Statistics Division of the Internal Revenue Service, net income earned by proprietorships, partnerships and corporations increased from $79,809 million in 1960 to $225,120 million in 1974. Statistics are not available for 1975.

8/ "Clearance" of network programs by affiliate stations is usually very high; ABC shows it as 95% or more for prime time and Monday-Friday daytime programming (though less in other parts of the week).

increases occurred at the expense of local station time which has declined by 25 percent since 1960. Additionally, Westinghouse maintains that network programming currently occupies up to two-thirds of the available time on affiliated stations. The networks, it is claimed, have also reduced the proportion of their total revenues devoted to station compensation which, of course, has also enhanced their profits. Westinghouse further maintains that between 1964 and 1975, station payments as a percent of network revenues declined from 23.1 to 13.4 percent. Similarly, it is contended that station compensation payments as a percent of station receipts decreased from 19.8 to 10.7 percent during the same period. It is suggested that these and related developments have adversely affected the ability of affiliated stations to meet their public service responsibilities.

14. When the allegations of Westinghouse and other parties are considered against this background of significant change in the commercial television industry, it appears that an inquiry is warranted. In order to protect the interest of the public in receiving the best possible programming service, the Commission must take a careful look at the question of whether the networks may have engaged in conduct which hampers the independent judgment of the affiliated station, and which restricts effective competition in the programming market.

Network-Affiliate Relations

15. In the paragraphs which follow, we will briefly discuss three areas of network-affiliate relationships which appear to be particularly pertinent in connection with this inquiry, and as to which comments are specifically invited, although, of course, parties may wish to discuss others. These are: (1) clearance of network programming and the expansion of network program schedules, (2) previewing of network programming by affiliated stations, and (3) the relationship between station compensation plans and the independence of affiliate stations. While we are confident that larger licensees will supply comments, we particularly urge affiliates in smaller markets and independent stations to provide us with their views. With respect to each of these matters, we would hope that commenting parties will support their arguments, as completely as is possible, with relevant statistics and other factual information. This will facilitate our assessment of the merits of these arguments as well as assist the staff in its fact-finding efforts.

16. Clearance of Network Programs and the Expansion of Network Schedules. Westinghouse has estimated that, in 1960, network schedules filled only about one-half of the total hours broadcast by affiliate stations, but that today network programs occupy approximately two thirds of these hours. It is argued that this increase has caused a corresponding decrease in the opportunities for independent programming decisions by station licensees. Implicit in this argument is an assumption that affiliated stations really do not wish to clear additional network programming, but that circumstances compel them to accept these programs anyway. In response to these claims, the networks argue that the overall figures on network program expansion are misleading and that regardless of the amount of increase, affiliates have supported and benefited from the additional programs.9/ We specifically invite comments on the extent to which such clearances are other than voluntary and the nature of any contractual provisions or other economic relationships which might serve to undermine the independent judgment of the station licensee.10/

17. In addition, we seek comments on the likelihood of further expansion of network schedules and whether this would impact on the financial performance of local stations as well as their ability to serve the interests

9/ It is further argued that these increases are largely attributable to ABC which accounted for more than half of the overall expansion of combined network schedules since 1960. Moreover, the networks maintain that the expansion was part of a "long process of building ABC into a fully competitive network." CBS and NBC, on the other hand, only expanded their schedules by 9 and 5 percent, respectively. Furthermore, the new network material has largely been late night, early morning (cleared, ABC and CBS note, by only about 80 percent of their affiliates) and weekend sports programming which has meant increased station compensation and/or made possible station broadcasts at times when the affiliates were previously off the air.

10/ Westinghouse has also suggested that the lack of joint efforts by affiliates in dealing with their network with respect to program clearances and other matters may have impeded their ability to serve the public. Some parties may wish to comment on the need for, legality, and propriety of such joint efforts.

of the local community.11/ We invite additional comments regarding any relationships between the length of network schedules, and the supply and demand for syndicated programming, particularly first-run material, available to affiliated and independent stations. With regard to the latter questions, we have noted various reports indicating that the networks, at some time in the near future, may increase the total amount of available commercial minutes per hour in prime time. We ask for comments on whether this would significantly impede the development of additional networks, specialized networks, and other syndicated program offerings in competition with network programming.

18. Previewing of Network Programs by Affiliate Stations. Westinghouse has also alleged that the networks do not afford affiliated stations a reasonable opportunity to review network programming before it is shown to local audiences, thereby making it difficult for station licensees to exercise independent judgment concerning the suitability of particular episodes for their communities. With regard to this issue, it is suggested that audiences will become confused or angered if a program is cancelled after it has been promoted over-the-air or has been published as part of an announced program listing. Westinghouse contends that prescreening opportunities are commonly delayed until after this promotional material has been provided to the public. Network comments in response to the Westinghouse petition contain extensive descriptions of present (in the case of NBC, recently amended) procedures for informing affiliates in advance of network program content, procedures which the networks claim are "adequate."12/ We invite comments on

11/ With regard to this specific question, Westinghouse has estimated that an expansion of network news to one hour would cost affiliate stations a total of $75 million annually and would increase total network income (including O and O's) to 50 percent of all industry income.

12/ All three networks provide affiliates with written materials summarizing future programs. Policies on allowing actual previews of programs are: ABC - up to 15 hours per week (9 on the average), including all programs which carry a parental guidance advisory; CBS - no hour per week figures, but provides programs of particular interest "virtually on a daily basis" and theatrical movies approximately 4 weeks in advance where practical; NBC - up to 20 hours per week (series episodes, theatrical and made-for-television movies, specials), programs with parental guidance advisories and any available program requested by an affiliate. (Continued.)

the nature and adequacy of the information which is presently provided to affiliates concerning up-coming programs, and the extent to which improvements may be needed so as to allow the effective exercise of licensee discretion. We also invite comments on the cost and inconvenience which may be associated with the provision of additional, or more timely, program information. Finally, we encourage comments regarding the extent to which affiliates currently prescreen network programs as well as their willingness to make use of additional prescreening opportunities if made available.

19. Station Compensation Plans. Traditionally, the networks have paid their affiliated stations for clearing network programming, or more precisely, for clearing the network commericals which are associated with that programming. While the methods used to determine these payments are rather complicated, they are directly related to the size of a station's audience and constitute an important ingredient contributing to the financial health of affiliated stations. While the Commission is not concerned with the earnings of stations per se, we do become interested when financial arrangements detract from the ability of these stations to live up to their responsibilities as public trustees. In 1963, for example, we found that a proposed CBS compensation plan would discourage affiliates from rejecting network programs which they believed to be unsatisfactory or contrary to the public interest. CBS Network Compensation Plan, 24 R.R. 520a; 1 RR 2d 696 (1963). In this instance, the Commission stated that:

> Any graduated payment plan wherein the average hourly rate of compensation varies greatly with or is heavily influenced by the number of hours

11/ (Continued.) ABC and NBC both refer to their program standards departments as one way of insuring that programs are "acceptable" to affiliates (although Westinghouse points out that licensees must determine acceptability based on local, not national standards). Other network policies in this area include showing pilot programs to affiliates at annual meetings and during the preceding season and permitting affiliates to invite newspaper television critics to previews. Finally, it is said that there are practical problems in providing affiliates with programs 4 weeks in advance, as Westinghouse requests - production schedules and editing, MPAA classifications and dealing with the creative community.

> taken and which as a practical matter, requires an affiliate to take the majority of its programs from the same network without regard to the merits of the programming offered, is barred by our rules.

Id. at 698.13/ We invite comments on the extent to which the networks' present compensation plans are consistent with this principle. These contracts variously call for affiliates to carry up to an equivalent of 24 hours of prime time programming per month without compensation or for dollar discounts which amount in substance to roughly the same thing. We are specifically interested in the effect these provisions have on the independent discretion of our licensees and on the ability of syndicators and other program suppliers to compete with the networks by dealing directly with affiliated stations.14/ We are further interested in (1) whether and to what extent uncompensated prime time represents a justifiable means of sharing the overhead expenses associated with network program procurement and (2) the extent to which the average amount of compensation for each half hour of network programming cleared by a station varies depending on the total amount of network programming cleared by that station.

20. In its petition, Westinghouse states that between 1964 and 1975 the net income of the networks increased by 246%, whereas compensation payments to stations increased only 20%. It is argued that, by virtue of their powerful economic position, the networks have been able to limit compensation payments and thus realize a rather dramatic increase in their profits. This argument suggests that the advantages of networking, as opposed to syndication, are very substantial. That is, in the absence of anti-competitive practices, artificially depressed levels of station compensation would be expected to provide a fertile opportunity for entry by non-network program sources. We are most interested in comments on the question of whether the

13/ Aside from this concept, network control over a station's network rate has the potential for use by the network to influence the station's clearance decisions and also the level of its national spot advertising rates. See American Broadcasting Company, 17 R.R. 450, 462-463; Columbia Broadcasting System, Inc., 17 R.R. 447, 449; National Broadcasting Company, Inc., 17 R.R. 449, 452-453 (all 1958).

14/ A brief discussion of this issue may be found in the "Barrow Report," supra. pp. 463-66.

economic picture painted by Westinghouse is complete and accurate and, if so, what factors exist which discourage vigorous competitive activities by syndicators or the creation of a "fourth network." Comments are also invited on the effects which various changes in compensation plans might have on the health and viability of networking and the ability of the networks to contribute to programming in the public interest. We would encourage comments, particularly from our licensees, regarding relationships between compensation payments and expenditures to serve local programming needs (including locally produced material) as well as their ability to compete effectively with networks for national spot advertising. With regard to the latter two questions, it is alleged that relative decreases in compensation have forced stations to increase prices for national spots, while at the same time, permitting the networks to reduce commercial rates charged to national advertisers. This, according to Westinghouse, has afforded the networks a substantial competitive advantage which has adversely impacted on station revenues and on the quantity and quality of local service. Finally, parties are free to comment on any other aspect of network compensation plans or contractual relations which may be inconsistent with legitimate public interest objectives. We stress again, however, our unwillingness to become involved in the amount of station compensation per se (i.e., without reference to practices which are anti-competitive or contrary to the public interest).

Network-Program Supplier Relations

21. Our discussion of the relationships between the networks and program producers and suppliers is divided into the following six categories: (1) network interests in syndicated programs produced by independent suppliers, (2) network produced entertainment programming, (3) contractual tying agreements relating to production facilities and program options, (4) exclusive exhibition rights to new programs, (5) exhibition rights to network reruns, and (6) relations between network owned and operated stations and program suppliers. Once again, parties are free to comment on other matters which may be relevant to this Inquiry. All parties are urged, however, to make every effort to support their arguments with factual information.

22. Network Interests in Syndicated Programs Produced by Independent Suppliers. The proposed NBC consent decree contains terms prohibiting NBC from acquiring distribution rights or profit shares in programs produced by outside producers, and from engaging in syndication of such programs anywhere, and from all syndication in the U.S. These

particular terms appear virtually identical to rules adopted by the Commission in 1970 (§73.658(j)), prohibiting such activities, including the acquisition of any interest in a program produced by an outside party beyond the right to network exhibition. We invite interested parties to comment on the adquacy of our present rules and to propose alternatives if that appears to be warranted. Parties may wish to comment, particularly, on programs such as the current Dinah program--created originally by CBS, produced for its 5 owned and operated stations by an outside entity, and syndicated nationally by a different company but often, according to Westinghouse, carried by CBS-affiliated stations. Westinghouse and NAITPD claim that this violates the spirit if not the letter of the 1970 rules, particularly in light of Dinah Shore's other contractual relations with CBS.15/

23. Network "In-House" Production of Entertainment Programs. Although most network entertainment programs are acquired from outside producers, a small number have been and are produced entirely by the networks themselves. This was one subject of the Department of Justice's antitrust action. The Department's position (as set forth in its competitive impact statement filed with the NBC consent decree) is that, just as with programs produced by others but in which the network acquires subsidiary rights, there arises a network predisposition to use such material regardless of its merit, and independent producers are thus unduly excluded from the network program market. Other parties have alleged that the unlimited network potential for producing their own entertainment programs can be used to obtain first-run programming at unreasonably low prices. While we are not concerned with the profits of program producers as such, we are interested in the question of whether this factor gives the networks an anti-competitive advantage over potential competitors, and whether the advantage works to limit the supply of independently produced programs. Parties addressing the possibility of Commission regulation in this area should attempt to assess the possible effects of such restrictions on: (1) network programming

15/ Westinghouse also mentions the fact that the program is produced by CBS facilities (see para. 25, below). While not mentioned by Westinghouse, other pertinent factors in this connection could be: (1) the proportion of guests on the show which are CBS "talent"; and (2) whether or not CBS advanced financing for the program.

schedules, as to quality and type of programming; (2) prices paid for network exhibition rights; and (3) the cost and supply of syndicated programming available to local stations.

24. Contractual Tying Agreements Relating to Production Facilities and Program Options. Independent production companies have periodically maintained that the networks agree to purchase a particular program on the condition that the producer grant the networks other rights or interests which are not incidental to network exhibition of that program. These interests, it is said, sometimes include a commitment to use network-owned production facilities to produce the program. We suggest that commenting parties address themselves to the question of whether such arrangements to the extent that they exist, may affect competition in the offering of program production facilities. We are further interested in obtaining information regarding the following questions: (1) what proportion of all network programs are produced using network owned facilities or that of other networks, (2) how does the cost of leasing these facilities compare with the cost of leasing facilities owned by others, (3) what percentage of total production costs is attributable to the cost of leasing facilities, and (4) does that percentage vary by type of program?

25. It is also alleged that the networks commonly demand options on exhibition rights for as much as five to seven years following the development of a script or program pilot, thereby precluding competition in bidding for the rights to a program which develops into a highly successful series. We invite comments on the effects which such practices could have on competition, and, more specifically, on the supply of programs available to local stations through the syndication market, and also on the extent to which these clauses may limit the life expectancy of a first-run series. Comment is also invited on (1) the extent to which extended options may be necessary to cover a network's heavy expenses in developing and promoting program series, (2) whether the terms and conditions of options differ for various types of programs, (3) their impact on the profitability of an investment by a producer in independently produced entertainment series, (4) the relationship between program options and the life expectancy of a new series and the subsequent availability of that series in the syndication

markets and (5) the extent to which changes in program options would or could affect station compensation payments.

26. Exclusive Exhibition Rights for Program Pilots. In a given year, the networks typically purchase exhibition rights to a far greater number of new programs than they can possibly use. In large measure, such purchases are necessary to enable the network to select an attractive line-up of programs and to replace those which generate relatively small audiences. Nevertheless, we believe that it is appropriate to seek comments on whether some present practices unduly restrict the release of a significant number of pilots for further development and thereby limit the amount of first-run material available for syndication, and whether this programming might, in some instances, provide viable competition to network offerings. More specifically we invite comments regarding (1) the extent to which networks have eventually used programs which were initially rejected for regularly scheduled distribution; (2) the amount of elapsed time between initial rejection and eventual acceptance of these programs during the past 10 television seasons; and (3) any differences in the duration of exclusive rights to new series which depend on the type of program (e.g. prime-time series as opposed to day-time, situation comedy as opposed to drama etc.). Finally, parties are invited to comment on whether these rights influence the diversity of network schedules or the availability of first-run syndicated programs.

27. Exhibition Rights to Network Reruns. The Department of Justice has raised a question as to whether limitations should be placed on the ability of networks to secure exclusive rights to rebroadcast episodes originally shown in a previous television season. Specifically, the consent decree contains a provision that negotiations for exhibition rights to repeats, originally broadcast in a preceeding season, must be separated from negotiations for rights to first-run exhibition. We invite comments regarding the need for such restrictions and their effect on (1) the cost of repeats to the network and local stations, (2) network use of repeats in day-time, prime-time and fringe hours, (3) investment opportunities in new first-run network and syndicated programming and (4) the demand for new as well as repeated syndicated material available to local stations. Parties are invited to comment on any other aspect of this issue which warrants our attention. It is not our wish to reopen here the issues regarding same-year repeat episodes which were dealt with in the Commission's inquiry concerning the networks' use of reruns in prime-time entertainment programming (Docket No. 20203, 37 RR 2d 1435).

28. The Relations Between Network Owned and Operated Stations and Program Suppliers. The networks also participate in the programming market as station owners. It has been alleged by Westinghouse that certain practices used by the networks in acquisition of programming for the owned and operated stations have adversely influenced the quantity and quality of syndication offerings. It would be helpful to the Commission to know the extent of block buying of programming for each network owned station group (i.e., the purchase of the same programs for exhibition on all of the stations in that group.) The Commission is also interested in whether any relationship exists between the purchase of first-run programs for O and O exhibition and the leasing of network owned facilities for the production of those programs. Comments are invited on whether a "network deal" in the form of a contract for exhibition on an O and O group is a prerequisite for the success of a first-run program sold in the syndication market. Parties are also free to address other issues concerning the impact which network practices with respect to owned and operated stations may have on the programming market and, in particular, the impact which such practices might have on the successful syndication of programming in direct competition with network offerings. While this inquiry concerns the business practices of the networks as they may impact on industry competition, and while attention, thus, must be paid to network practices with respect to the O and O's, we wish to make it clear that this is not a multiple or "group" ownership proceeding.

29. The Nature of this Proceeding. Comments and other information filed in connection with this inquiry will be evaluated by a special staff composed of economists, attorneys, and others with relevant experience and expertise. This staff will be under the direct supervision of the full Commission.16/ The staff's analysis of the comments and reply comments may be followed by the issuance of questionnaires or inquiries designed to provide a complete factual record. If at any point it appears that these procedures are inadequate, the special staff will be authorized to initiate compulsory processes under Section 403 of the Act. It is hoped that a report concluding this inquiry can be completed within one year following receipt of the comments.

16/ The special staff which conducted the 1955-57 inquiry was under the supervision of a committee of four Commissioners. In the present instance, however, we see no need for the establishment of such a committee.

30. IT IS ORDERED, that the petition for inquiry, rule making and immediate temporary relief, filed September 3, 1976, by Westinghouse Broadcasting Company, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

31. Authority for the institution of this proceeding is contained in Sections 4(i), 303(g), (i) and (r) and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set out in Section 1.430 of the Commission's Rules, interested persons may file comments on or before May 2, 1977 and reply comments on or before June 1, 1977. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken herewith. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice. We recognize that some parties may wish to file comments which include confidential financial information or other material which they may be reluctant to make public. In a manner consistent with the Freedom of Information Act (5 U.S.C. §552) we will consider requests for confidential treatment made under §0.459 of our Rules. As set forth in that section such requests may be made in advance.

32. In accordance with the provisions of §1.419 of the Rules, an original and 5 copies of all comments, replies pleadings, briefs, and other documents shall be furnished the Commission. Material filed will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION*

Vincent J. Mullins
Secretary

*See attached Separate Statement of Commissioner Joseph R. Fogarty.

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest

While I agree fully with the Commission's decision to undertake this Inquiry into network programming practices and policies, I wish to state my understanding of one particularly important aspect of the Notice we announce today.

At paragraph 28 of this Notice, we request comment on the relations between network owned and operated stations (O&O's) and program suppliers, noting certain allegations which have been raised regarding possible adverse effects of these relations on the quantity and quality of syndicated programming. The Commission also notes, however, that "this is not a multiple or 'group' ownership proceeding." While I agree that this aspect of our Inquiry should not be considered a "multiple ownership" proceeding per se, I do not read this advisement as precluding the examination of any issues as to multiple ownership as it may affect the programming market. Nor do I view this statement as precluding future Commission consideration of appropriate action to remedy any abuses which this Inquiry may disclose.

APPENDIX D

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

December 3, 1976

HONORABLE RICHARD E. WILEY
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C.

Re: Westinghouse Broadcasting Company, Inc.
Petition for Inquiry, Rule Making and Immediate Temporary Relief. FCC File No. RM-2749.

DEAR CHAIRMAN WILEY:

It appears that the Comments we filed in the above-captioned proceeding may have raised questions concerning the relationship between the Comments and currently pending litigation between the United States and the three major television networks. (*United States* v. *CBS Inc.*, *United States* v. *American Broadcasting Companies, Inc.*, *United States* v. *National Broadcasting Company, Inc.*, Civil Action Nos. 74-3599, 74-3600, and 74-3601-RJK).

While we continue to believe that a general inquiry by the Commission into network practices is appropriate and fully warranted at this time, we wish to emphasize that the Department's Comments should not be construed as suggesting that the inquiry encompass those issues now being litigated in the Federal District Court in California.

Further, this letter and the Comments are, of course, in no way intended to preclude either the Commission or the Department of Justice from taking any action consistent with its respective responsibilities. *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959). We ask that a copy of this letter be associated with and made a part of the public record in this proceeding.

Sincerely yours,

DONALD I. BAKER
Assistant Attorney General
Antitrust Division

Copies to:
All Commissioners
American Broadcasting Companies, Inc.
CBS Inc.
National Broadcasting Co., Inc.
Citizens Communications Center
Westinghouse Broadcasting Co., Inc.

APPENDIX E

Overlap Between FCC Actions and Provisions of the Proposed Decree

Proposed Decree Provisions	FCC: Adopted Similar Relief	FCC: Adopted Different Relief	FCC: Currently Under Consideration	Note
Syndication (IV)	X		X	1
Financial interest (IV)	X		X	1
Production (V, VI(D))		X	X	2
Production facilities (VI(B), (C))			X	3
Contract options (VI(E)(i))			X	4
Exclusivity-program series (VI(E)(ii))		X	X	5
Exclusivity-feature films (VI(E)(iii))		X	X	6
Pilots (VI(F))	X		X	7
Spin-offs (VI(G))			X	8
Reruns (VI(H))			X	9

Notes

1. Network syndication and network acquisition of financial interests were considered in the FCC's Report and Order, Docket No. 12782, 23 F.C.C.2d 382 (1970) ("Program Practices Rulemaking"), and regulations were adopted that are similar to Section IV of the proposed decree. Those matters are being considered again in the FCC's recent Notice of Inquiry, Docket No. 21049 (Jan. 14, 1977) ("Network Practices Inquiry").

2. Network program production was considered in the FCC's Program Practices Rulemaking. However, the FCC declined to adopt a 50% limitation when it adopted instead the prime-time access rule. Report and Order, Docket No. 12782, 23 F.C.C.2d 382, 384 (1970). Network production is being considered again in the Network Practices Inquiry.

3. The terms on which network facilities for program production are made available to third parties are being considered in the Network Practices Inquiry.

4. Option provisions in contracts between networks and independent program suppliers are being considered in the Network Practices Inquiry.

5. The extent to which a network may obtain the exclusive use of program series was considered in the FCC's Second Report and Order, Docket No. 19554, 35 R. R. 2d 767 (1975) ("Pay Cable Rulemaking (II)"), and regulations were adopted, governing the use by cable and subscription television of program series, that are different from Section V(E)(ii) of the proposed decree. The matter is under consideration again in the Network Practices Inquiry and in the FCC's Notice of Inquiry, Docket No. 20402, 52 F. C. C. 2d 87 (1975) ("Broadcasting—Cable Inquiry").

6. The length of time which a network may obtain the exclusive use of a feature film was considered in the FCC's First Report and Order, Docket Nos. 18893 and 19554, 52 F.C.C.2d 1 (1975) ("Pay Cable Rulemaking (I)"), and regulations were adopted that are different from Section V(E)(iii) of the proposed decree. The matter is under consideration again in the Network Practices Inquiry and in the Broadcasting—Cable Inquiry.

7. The length of time during which a network may have the exclusive right to order a series based on a pilot produced for that network pursuant to a step-deal was considered in the FCC's Program Practices Rulemaking, and regulations were adopted that are similar to Section VI(F) of the proposed decree. 49 C. F. R. § 73.658(j) (ii). The matter is again under consideration in the Network Practices Inquiry.

8. Spin-offs from series exhibited on networks were considered in the Pay Cable Rulemaking (II). 35 R. R. 2d 767, 770 (1975). That matter is again under consideration in the Network Practices Inquiry.

9. The rerun rights a network may acquire with respect to original network series programming are under consideration in the Network Practices Inquiry.

APPENDIX F

Movie Blues

Film Exhibitors Face a Financial Crisis As Hollywood Studios Slash Production

By EARL C. GOTTSCHALK JR.
Staff Reporter of THE WALL STREET JOURNAL

HOLLYWOOD—To the growing list of shortages, add another: a dearth of movies.

The studio dream factories have slashed their output to a comparative trickle, because mounting costs and competition from television continue to make movie production less lucrative. But theater owners, citing economic considerations of their own, have been expanding the number of movie screens.

And so the exhibitors are reeling. Faced with fewer films when they need more, they are in the midst of a financial crisis. Some marquees have already gone dark, and many more theaters are struggling to stay open.

"The shortage is driving me right out of business," says Tom Patterson, owner of the Jonesboro (Ga.) Twin Theaters near Atlanta, which since last summer have been playing [illegible] and some relatively obscure nature and horror films. During the Christmas season, normally the biggest moviegoing period all year, all Mr. Patterson could offer were a nature film and a terror flick almost nobody had heard of. After a week of tiny audiences, his theaters reverted to showing "Jaws" and "Bad News Bears," both for a third run.

At least Mr. Patterson is still operating. The Walter Reade Organization, a national theater chain, has been forced to close seven of its 2? movie houses, and it also has been forced into federal bankruptcy court. Sheldon Gunsberg, the Walter Reade president, says, "We had other financial problems, but if we had had a good flow of movies, we could have avoided bankruptcy."

Production Is Falling

But "a good flow of movies" is impossible with Hollywood's tight fist on the funnel. During 197?, the latest year for which the National Association of Theater Owners has figures, 2?? movies (including 30 reissues) were released in the U.S., a record low and down from [illegible] five years earlier. During Hollywood's heyday, the so-called Golden Age of the forties, the studios produced some 4?0 movies a year. (The figures don't include readily available pornographic films, to which more theaters are turning.)

Figures on 1976 releases aren't available yet, but theater owners say the figures are certain to show a further decline. And still fewer movies are being projected for this year. Daily Variety, an entertainment-industry newspaper, reports that only 10 major studio movies have been set for first-quarter production this year, down from 1? in the same period last year. (And some of these productions may be [illegible] by a Writers Guild strike expected March 1 upon expiration of a contract.)

The producers, of course, say they haven't any choice but to make fewer movies. Costs are soaring, increasing the producers' risks, and movie audiences aren't growing very much. The Motion Picture Association, an industry group, says that the average cost of making a movie has risen more than [illegible] during the last four years to $3.7 million, and advertising and distribution costs can run $6 million on a $3 million movie. The number of tickets sold, while well above the depressed levels of the sixties, is still only a fraction of the sales level before the television era. An estimated [illegible] billion movie tickets were sold in 19?? compared with more than four [illegible] a year in the forties.

On top of all that, movie production is going to be hurt further by a recent federal tax change that wiped out a key tax shelter used by individuals who financed movies. The change will mean fewer investments and thus fewer movies, industry officials say.

Hollywood's production slump is compounded by the theater owners' expansion. The number of movie [illegible] screens [illegible] to about 1? [illegible] 6?? in 19?? That's still below the [illegible] of about 18,6?? but the [illegible] of [illegible] screens at many theaters [illegible] perhaps 2,?00 screens today.

The [illegible] say they [illegible] adding screens [illegible] smaller, to reduce the risks in booking a flop. "If you have one theater with [illegible] seats and have a film that's not doing well, you're in trouble," says Marvin Goldman, president of the National Association of Theater Owners. "If you have six [illegible] theaters, you might have three or four winners and two or three losers. You're better off." This assumes, of course, you have more movies to show.

But Samuel Z. Arkoff, chairman of American International Pictures Inc., a production company, says: "The theater owners are their own worst enemies. We can't possibly produce enough movies to cover all these new screens."

Limited Copies

Indeed, the producers claim it wouldn't be prudent even to increase the number of copies of each movie. Although [illegible] 2?? prints of the latest version of "King Kong" were produced, [illegible] bookers [illegible] finally limited each production to fewer than [illegible] prints. The producers say [illegible] the number of prints merely to [illegible].

Such tactics are hitting the theater owners hard. They are facing the toughest rental terms in history from film distributors, Robert Selig, an executive of Pacific Theaters, a [illegible] West Coast chain, says that distributors a decade ago typically got [illegible] of the [illegible] on a major picture. Now they often [illegible] and get [illegible] plus a [illegible] minimum gross.

Pacific Theaters says it was offered Paramount Pictures' "King Kong" on such tough terms that it had to turn it down. "Other chains may be able to make a profit on those terms, but we couldn't," Mr. Selig says. Pacific Theaters was hard pressed last year to find enough first-run movies. "We [illegible] and [illegible] every piece of film ever made [illegible] to put something on the screen," an official says.

Independent theaters complain that relatively well-heeled [illegible] get first crack at all the good [illegible]. "I had to wait eight months after 'Jaws' was released to get it and eight months for 'The Exorcist' too," says Mr. Patterson, the Jonesboro, Ga., theater owner. "About the time it's dead, they turn it over to us."

Feast or Famine

The theater owners also complain bitterly that movie companies dump most of their output on the market for the Fourth of July and Christmas periods, exacerbating the shortage during the rest of the year. [illegible] one slack period last year [illegible] releases were so [illegible] that many theaters around the country closed for periods of three weeks to two months until the Christmas releases [illegible].

"This is the first time in history that so many large [illegible] theaters closed because there were no [illegible]," says Joseph Alterman, [illegible] of the National Association of Theater Owners, who says he doesn't know exactly how many theaters shut. But at least [illegible] big theaters in New York City were affected.

Whether the theater owners can overcome their difficulties isn't clear. Lately, speakers at [illegible] of exhibitors have pleaded for an end to theater expansion. But nobody knows yet if the pleading has had any effect.

Meanwhile, the owners say they're struggling to stay in business, often by [illegible] movies that don't deserve to be shown. Here is Sy Levine [illegible] of General Cinema Corp., the [illegible] largest theater chain, commenting on the quality of many of today's recent movies: "Thank God we sell popcorn and candy bars."

7. An extension of the results

1964 was 0.10, the present value of 0.193 C may be calculated as follows:

$$[(0.193\,C)/4]\int_0^4 e^{-rt}dt = 0.04825C[(1 - e^{-0.4})/0.10] = 0.159\ C.$$

A long, tortuous route has brought us to an estimate of the value of syndication profits, which is nearly 16 percent of the price of a new episode of a program series to the networks.

How sensitive are these estimates to the assumptions made along the way? For instance, if the Little data were taken literally, the estimate of the present value of syndication profits would fall to 11.6 percent of new program costs. If all other assumptions were to be retained, an increase in the assumed cost of capital to 15 percent would lower present value from 0.159 to 0.145 C. An assumed growth rate of syndication profits of 20 percent would raise the estimate to 16.6 percent. Only the denial of the assumptions in the Little Report's calculations of industry profits seems of great importance, but this denial seems warranted even though our adjustment is certainly a rough one.

The final accounting estimate of the value of all syndication interests—16 percent of new program costs to the networks—is well within the confidence interval of our econometric estimate of 19 percent (Table 2). It would therefore appear that networks have paid an amount equal to the discounted present value of the distribution rights and profit shares which they have obtained. The Prime Time Rule has not saved the program suppliers from the rapacious tendencies of network buyers; it has simply required the suppliers to assume more risk or to sell these syndication interests to other buyers.

■ If we extend the theoretical model developed earlier in this paper, we may utilize the regression results along with further empirical analysis to make a rough estimate of the degree of monopoly-monopsony power possessed by the networks.

For instance, suppose that (1) is appropriately represented by (1′):

$$A_1 = \frac{f\left(\sum_{j=1}^{M} t_{1j}\right)}{F\left(\sum_{n=1}^{N}\sum_{j=1}^{M} t_{nj}\right)} \qquad \begin{matrix} \partial A_1/\partial t_{1j} > 0 \\ \partial A_1/\partial t_{nj} < 0 \\ n \neq 1 \end{matrix} \tag{1'}$$

If we assume further that $f'(\ ) > F'(\ )$, then:

$$\frac{\partial A_1}{\partial t_{1j}}\cdot\frac{t_{1j}}{A_1} = \frac{f_j'(\ )t_{1j}}{f(\ )}\left[1 - \frac{f(\ )}{F(\ )}\right]. \tag{10}$$

where $f_j'(\ )t_{1j}/f(\ )$ is the elasticity of the network's own audience with respect to its own investment in the jth input. If we call this elasticity μ_j, we may insert (10) into (4) to obtain

$$\left|\frac{\eta - 1}{\eta}\right|\cdot P_A A_1\sum_{j=1}^{M} k_j\cdot\mu_j\left[1 - \frac{f(\ )}{F(\ )}\right] = \sum_{j=1}^{M} p_j t_{1j} \tag{11}$$

At Cournot equilibrium, $1 - f(\ )/F(\ )$ becomes $1 - 1/N$, where N is the number of rival networks. If we assume further that all $k_j = k$, we may write the expression for Cournot equilibrium as

$$k\left[\frac{\eta - 1}{\eta}\right]\left[\frac{N - 1}{N}\right]\left[\sum_{j=1}^{M} \mu_j\right][P_A A_1] = \sum_{j=1}^{M} p_j t_{1j}. \qquad (12)$$

For talent inputs alone, this relationship simply states that above-the-line expenditures are equal to the product of the audience expected from the program and the sum of the elasticities of audience with respect to each input multiplied by three terms which reflect the intensity of competition among networks for audience, advertising revenue, and performers. In our regression results of the previous section, the estimate of a_2 is

$$a_2 = k\left[\frac{\eta - 1}{\eta}\right]\left[\frac{N - 1}{N}\right]\left[\sum_{j=1}^{K} \mu_j\right] \approx 0.10.$$

If we could determine the value of the sum of the elasticities, $\sum_{j=1}^{K} \mu_j$, we would be able to estimate the value of $k[\eta - 1/\eta]$ for $N = 3$, the number of networks throughout our sample period.

Unfortunately, we do not have precise data on the distribution of above-the-line and below-the-line costs for our U. S. sample, but the foreign noncommercial data do permit us to attempt to estimate $\sum_{j=1}^{K} \mu_j$. These foreign data contain observations on above-the-line costs, payments to performing artists, and audience for 54 light entertainment and drama series. The light entertainment series—mostly filmed comedy or light drama and music-variety programs—are likely to be chosen to provide the maximum audience per unit cost, but the drama series may well be chosen to satisfy the tastes of a sizeable minority despite the costs involved in their production. For this reason, empirical investigation into cost-audience relationships are likely to be useful only for the light-entertainment series.

In order to obtain a measure of $\sum_{j=1}^{K} \mu_j$ from the noncommercial program experience, we estimate two forms of simple regressions of audience upon costs—one which is linear and one which is log-linear.[36] The independent variables are either artists' costs or

[36] The regression of audience upon either component of costs provides us with a direct estimate of the effect of talent inputs upon audience. The linear regression gives us a slope coefficient equal to $\sum_{j=1}^{K}(\partial A/\partial t_j)$ and the loglinear regression yields slope coefficients equal to $\sum_{j=1}^{K} \mu_j$. This result may be proved quite simply. If audience is denoted A and total factor payments of the appropriate category are denoted $\sum_{j=1}^{K} p_j t_j$ and if we assume that $A = \alpha\left[\sum_{j=1}^{K} p_j t_j\right]^{\beta}$, $\partial A/\partial t_j = (\beta A/p_j)\left(\sum_{j=1}^{K} p_j t_j\right)$ and $(\partial A/\partial t_j)(t_j/A) = \beta(p_j t_j)\left(\sum_{j=1}^{K} p_j t_j\right)$. Summing over all K inputs gives $\sum_{j=1}^{K}(\partial A/\partial t_j)(t_j/A) = \beta$. But $\sum_{j=1}^{K} \mu_j = \sum_{j=1}^{K}(\partial A/\partial t_j)(t_j/A)$; therefore, $\sum_{j=1}^{K} \mu_j = \beta$.

Response to Comments Submitted by CBS Inc.

CBS directs its comments to two general propositions. First, it argues that the entry of the proposed NBC Judgment is not in the public interest because the activities attacked in the three network complaints are not cognizable under the antitrust laws and in any event are protected by the First Amendment; and, second, it asserts that the Competitive Impact Statement ("CIS") fails to satisfy the requirements of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. §16(b)-(h) (1976). For the reasons stated below, both of these contentions are, we believe, without merit.

I. Entry of this Judgment is in the Public Interest Since it Satisfactorily Settles an Antitrust Case, Does Not Conflict with any Past or Anticipated FCC Regulatory Action and Does Not Offend the First Amendment.

CBS seeks to paint the proposed Judgment as anticompetitive 1/, but as the Competitive Impact Statement demonstrates, its provisions are pro-competitive and they provide satisfactory and expeditious relief. Moreover, the Judgment's entry is not precluded either by past or anticipated actions of the FCC or by the First Amendment. In sum, when measured against the appropriate antitrust public interest standard, this Judgment is in the public interest.

A. The Procedure and the Standard of Review Established Under the Antitrust Procedures and Penalties Act.

Pursuant to the APPA, the Court must find that entry of a proposed Judgment is in the public interest. [15 U.S.C. §16(e)]. While such a requirement is not new [United States v. Carter Products, 211 F.Supp. 144, 147-48 (S.D.N.Y. 1962)], the procedure for arriving at such a finding has been altered dramatically under the Act.

The APPA sets forth explicit requirements which must be satisfied by the Department of Justice before the Court can enter a judgment. The Act requires that notice be given to the public, and a Competitive Impact Statement ["CIS"] be filed with the Court and published in the Federal Register [15 U.S.C. §16(b)], that the public have a period of at least 60 days from publication within which to file comments to the proposed Judgment, and that the comments and the

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1/ Under the guise of filing comments on the NBC Judgment, CBS apparently seeks to resurrect for reargument and reconsideration every motion it has made and lost during the pendency of its own case. In that connection, on February 9, 1977, the Court denied CBS's Summary Judgment Motion, finding that the existence of genuine issues of material fact, the complex nature of the litigation, and the controlling issues of motive, intent and reasonableness of the challenged agreements made summary judgment inappropriate. Further, on February 16, 1977, the Court ruled that the FCC did not have exclusive jurisdiction over the subject matter

Barbara A. Watt 5/6/77

1/ continued of the three network cases, and denied CBS's motion to dismiss. United States v. CBS Inc., 1977 Trade Cas. ¶61,327 (C.D. Cal. 1977).

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Government responses thereto be filed with the Court and published in the Federal Register. [15 U.S.C. §16(d)].

Once this procedure has been completed, the Court has broad discretion in deciding what further to consider. The APPA suggests that the Court consider the matters addressed in the CIS, including the competitive impact of the judgment, the provisions for enforcement or modification, the alternatives considered, and the impact on the public generally [15 U.S.C. §16(e)(1) and (2)].

While there is broad discretion in the Court in deciding what issues to consider and what steps to take to insure a complete ventilation of the consent process, the cases in which the public interest standard has been considered and the legislative history both strongly suggest that the standard to be met in determining whether entry is in the public interest, is whether the Judgment is consistent with the allegations of the complaint and the enforcement of the antitrust laws. United States v. Associated Milk Producers, Inc., 394 F.Supp. 29 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, U.S. , 97 S.Ct. 355 (1976); United States v. Gillette Co., 406 F.Supp. 713 (D. Mass. 1975); United States v. Morgan Drive Away, Inc., 1976-1 Trade Cas. §60,949 (D.D.C. 1976); see United States v. Carter Products, Inc., 211 F.Supp. 144, 148 (S.D.N.Y. 1962). This determination must include a recognition that antitrust consent settlements are an appropriate and beneficial enforcement tool, that compromise may be involved, and that the Attorney General has broad discretion as to the terms of such settlements.

In United States v. Associated Milk Producers, Inc., supra, the District Court entered a consent decree after finding the Government's resolution of dissolution or divestiture relief to be "well within the discretionary power of the Attorney General under existing law." [394 F.Supp. at 45]. The Eighth Circuit, in affirming, noted:

> It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest. [534 F.2d at 117].

In United States v. Gillette Co., supra, the Court, in approving a consent decree, explained:

> It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest. Basically I must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass. [406 F.Supp. at 716].

In United States v. Morgan Drive Away, Inc., supra, the Court also imposed a limited standard of review in determining whether entry of the decree was in the public interest. Judge Flannery stated that:

> The result of the bargaining toward settlement should not be measured against what concessions the Government might have succeeded in exacting from the defendants had it bargained somewhat harder, or even against the probable outcome had the case gone to trial. [1976-1 Trade Cas. at p. 69,191]

The Court went on to rule, after considering comments in opposition, that the comments "have not undermined the conclusion of the United States that the proposed Judgment is in the public interest. . . ." [1976-1 Trade Cas. at p. 69,191].

These decisions are consistent with the Congressional intent that consent decrees must remain a viable enforcement option. Such an option would not long remain viable were it necessary for a Court to conduct a de novo determination of the factual issues relevant to the adequacy of the proposed decree. 2/ In fact, the Senate Report advises that, "[o]nly

2/ The Senate Report states:

> The Committee recognizes that the court must have broad discretion to accommodate a balancing of interests. On the one hand, the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option. It is not the intent of the Committee to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the

where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so." [S. Rep. No. 298, 93d Cong., 1st Sess. 1, 6 (1973)]. 3/

Moreover, Congressional intent is clear that the applicable public interest standard is one of judicial construction based on the antitrust laws and antitrust precedents. The

2/ continued

> necessary information through the least complicated and least time-consuming means possible . . . .
>
> [S. Rep. No. 298, 93d Cong. 1st Sess. 6 (1973)].

3/ The competitive impact statement required by the APPA is similar to the environmental impact statement required by the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §4321, [119 Cong. Rec. 24599 (1973)]. NEPA, like the APPA, does not call for a de novo review of governmental action. Upper W. Fork River Watershed Ass'n. v. Corps of Engineers, 414 F.Supp. 908, 915 (N.D. W.Va. 1976). Cf. Camp v. Pitts, 411 U.S. 138 (1973). Further, the Court is neither empowered to substitute its own judgment for that of the Government, Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972), nor required to make findings of ultimate fact or resolve conflicts between the economic theory and data relied on by the Government and that presented by those objecting to the Government's action. Environmental Defense Fund, Inc. v. Froehlke, 368 F.Supp. 231, 240-41 (W.D. Mo. 1973), aff'd sub nom. Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir 1974).

original bill included a provision 4/ which stated that the entry of a consent decree must be found to be "in the public interest as defined by law." The phrase "as defined by law" was deleted from the bill according to the House Report,

> . . .as a recognition that the content of the phrase, "public interest," is a product of judicial construction in the context of particular statutes . . . and to provide illumination and consistency in the usage of the phrase, the "public interest" . . . . Preservation of antitrust precedent rather than innovation in the usage of the phrase, "public interest," is, therefore, unambiguous. 5/

Thus, based upon the Act itself, upon the interpretive Court decisions to date, and upon the Congressional intent as expressed in the legislative history, the Court must decide, after taking into consideration all evidence in support of the proposed Judgment and all opposition to it, whether the Government made a clear error in judgment or abused its discretion. If, based upon that review, the Court finds that the entry of the decree would be consistent with the allegations of the Complaint and the enforcement of the antitrust laws, then the Court should enter this Judgment in order to provide expeditious relief by eliminating anti-

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4/ In Section 2(e).

5/ H.R. Rep. No. 1463, 93d. Cong., 2d Sess. 1, 11 (1974).

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competitive restraints. See United States v. Carter Products, Inc., 211 F.Supp. at 148.

B. The Judgment Provides Satisfactory and Expeditious Relief from the Violations Alleged in the Complaint.

The proposed Judgment addresses the antitrust violations alleged in the NBC complaint and seeks to provide procompetitive relief from those violations. 6/ CBS has challenged

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6/ The CIS states:

> The Complaint alleges that NBC used its control over access to the broadcasting time of the NBC Television Network during prime evening hours for the following purposes: to exclude from network broadcast those entertainment programs in which NBC had no financial interest; to compel independent program suppliers to grant to NBC financial interests in television programs which it accepted for broadcast; to refuse to sell air time to advertisers and other independent program suppliers seeking to have their own programs shown on the NBC network; to control the prices paid by NBC for television exhibition rights to motion picture feature films; and to obtain competitive advantages over other producers and distributors of television entertainment programs and of motion picture feature films. [CIS at 2]

The Judgment addresses those issues: (1) by limiting for a period of 10 years, the amount of television entertainment programming that NBC may produce for use on its own network;

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the entry of the proposed decree as anticompetitive, basing its contention on the proposition that the antitrust laws do not apply to the activities alleged in the complaint. [CBS Comments at 4-17]. However, the Court already rejected the contention that the antitrust laws do not apply to such network activities when it denied defendants' Motions for Summary Judgment. 7/ Further, the Government believes that the relief provided in the Judgment would be procompetitive.

CBS first argues that the program production limitation of Section V is anticompetitive, since it would to some

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6/ continued

(2) by prohibiting NBC from conditioning access to its television network upon an independent program supplier's grant of any other right or interest to NBC, including its agreement to use NBC's production facilities; (3) by limiting for periods of 10 or 15 years the contractual rights which NBC may obtain in connection with network exhibition of a program, including limitations on NBC's right to exclusive use of a program; (4) by enjoining NBC from obtaining any right or interest in television entertainment programs produced by others, except for the right to network exhibition; (5) by enjoining NBC from engaging in domestic syndication of any television entertainment programs, and from engaging in foreign distribution of programs other than those produced abroad or by NBC; and (6) by prohibiting reciprocal program production arrangements between NBC and either CBS or ABC.

7/ See p. 1 at n.1, supra.

extent eliminate NBC as a potential competitor in the program production market. [CBS Comments at 6-7]. 8/ The limited ban, however, is procompetitive, not anticompetitive, because it would eliminate the possibility that NBC could substantially increase its internal production of network programs, thereby excluding independent program suppliers with which it competes. While it prevents NBC from supplying more than 2-1/2 hours during prime time, plus 2 specials every six months, it at the same time insures that the remaining prime time is open to all potential program producers to compete with each other in supplying programs to NBC. 9/ CBS's position mistakenly assumes that each network has an unquestioned right to require that all the entertainment programming

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8/ Plaintiff originally sought a complete ban on production by NBC, and will continue to press for this relief against CBS and ABC. Relief against NBC's internal production was limited in order to put a lid on such production without the necessity of a full trial.

9/ CBS's reliance on United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964), for the proposition that NBC is important as a potential entrant to the oligopolistic entertainment program production market, is misplaced. The problem being addressed in these cases is the illegal conversion of each network's power in broadcast distribution and exhibition into monopsonistic buying power in the television program procurement market.

broadcast by its nationwide chain of affiliated television stations be produced by it. 10/

A limitation on total integration, in the face of an abuse of market power or a restraint of trade, is a recognized remedy under the antitrust laws. Thus, in the movie cases, the Supreme Court upheld a Judgment which prohibited the defendants from engaging in all phases of the movie industry:

10/ CBS asserts, in effect, that it not only has a legal right to produce all the prime time entertainment programming shown on its network, but that it can condition access to its network on program suppliers' agreement to grant subsidiary rights and interests in programs, can refuse to sell air time to advertisers or others who might provide their own programs, and can extract long term options and exclusivity from program suppliers, all without scrutiny under the antitrust laws. This argument goes well beyond a possible, plausible objection to entry of this Judgment. For, under the antitrust laws,

> . . .the existence of power 'to exclude competition when it is desired to do so' is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power [citation omitted]. It is indeed 'unreasonable, per se, to foreclose competitors from any substantial market.' International Salt Co. v. United States, 332 U.S. 392, 396. [United States v. Griffith, 334 U.S. 100, 107 (1948)].

production, distribution and exhibition. United States v. Paramount Pictures, Inc., 334 U.S. 131, 170-175 (1948). Here, NBC is currently in the production, distribution and exhibition of television programs; the production limitation would prohibit it from using the combined power of its affiliated group of television stations to totally engross television entertainment program production unto itself.

The production limitation is also important because it would curtail NBC's ability to favor internally produced programs over independently produced programs in which it had no rights and interests. In sum, in conjunction with the prohibitions of Sections IV and VI of the proposed Judgment, the production cap would severely inhibit NBC's ability to use its control over access to its nationwide chain of stations to restrain trade.

CBS also asserts that the "restrictions on the terms of trade" found in Section VI are anticompetitive [CBS Comments at 13-17]. 11/ The gist of CBS's argument is that each network should be permitted to continue to exact, as its price for considering an entertainment program (including feature films), the producer's agreement not to permit its use by any other network, station or communications medium. 12/

11/ It specifically criticizes Sections VI(E)(i) and (ii) and VI(H).

12/ Another element of CBS's argument against these restrictions is that the networks will offer decreased license fees for programming because they can no longer

In short, CBS wants to continue to eliminate any possible competition for any possible use of an entertainment program, and the proposed Judgment would put some limits on this practice. 13/ All of the contract provisions affected by

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12/ continued

acquire various residual rights and protection from competition, and as a result, will force out small independent producers without ample resources. This, CBS asserts, would result in higher concentration in the program production industry. [CBS Comments at pp. 13-16].

While this theory is open to question on several grounds, the basic difficulty with it is that it involves sheer speculation as to whether or not NBC will offer decreased license fees, a dubious premise since such fees are presently below the cost of production for many programs. Moreover, CBS itself contradicts this hypothesis when it states that entry of the decree would be anticompetitive because it allegedly would "restrict the supply of programming and drive up program prices." [CBS Pleading in Intervention, dated April 20, 1977, par. 4, at p. 2]. CBS's observations on the decree's effects on programming price levels appear to differ depending upon which provision CBS is attacking.

13/ The antitrust laws are as much violated by the prevention of competition as by its destruction. United States v. Aluminum Co. of America, 148 F.2d 416, 428-429 (2d Cir. 1945). Thus, acquisition of syndication and other distribution rights and profit shares, often before the development

this Judgment involve restraints on competition, be that competition during the first "prime time" run, or competition for the use of repeat rights or syndication rights. Restraints such as NBC's exclusivity against domestic syndication or stripping, prevent local stations and the other networks from competing for the right to broadcast the program until after NBC has milked every possible bit of revenue from it. This exclusivity provision also allows the network, if it so chooses, to strip reruns of the program on its own network at a different time without any fear that the supplier can seek a better price or better terms from any other broadcaster. The proposed Judgment seeks to increase the chance that a program supplier could exploit the after market uses of his product much earlier than is currently possible, and would permit other networks and television stations to compete with NBC for rights to do so. This is hardly anticompetitive.

Antitrust relief often involves the imposition of limitations on the contractual abilities of a defendant who

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13/ continued

of a program has passed the idea stage, prevents competition for those rights by other syndication or merchandising companies. Long term renewal options on the program prevents competition for successful programs among the networks or from first run syndication on a station by station basis. The current contracts of all three networks also prevent the supplier from stripping or syndicating older episodes of a series for the entire life of the series on the network.

has violated the Sherman Act. 14/ It is not a valid ground for objection that the particular contractual terms subjected to injunctive provisions may be legal in themselves. 15/ Indeed, a court may affirmatively "interfere" in the bargaining process by requiring mandatory selling or leasing on reasonable terms, and even by setting reasonable rental charges, if such measures are necessary to reestablish competitive market conditions. 16/

Since the relief in an antitrust case must be structured to effectively redress violations and restore competition,

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14/ For example, the consent decree entered in United States v. Swift & Co., No. 37623 (D.C. Sup. Ct., Feb. 27, 1920), a case in which several large meatpacker defendants were accused of unduly extending their market power into other related lines of commerce, enjoined the defendants from inter alia (1) engaging in the business of manufacturing, selling or transporting any of over a hundred commodities, (2) using or permitting others to use their distribution facilities for the handling of any of those commodities, (3) selling meat at retail, (4) holding any interest in any public cold storage plant and (5) selling fresh milk or cream.

15/ See International Salt Co. v. United States, 332 U.S. 392, 400 (1947). Cf. American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

16/ See United States v. Glaxo Group Ltd., 410 U.S. 52, 64 (1973); United States v. United States Gypsum Co., 340 U.S. 76, 94 (1950); In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 235-236 (9th Cir. 1976).

"the District Court is clothed with 'large discretion' to fit the decree to the special needs of the individual case" 17/, and it is clear that in these cases, the networks' power to coerce restrictive contract provisions cannot remain unbridled.

C. The Entry of this Judgment is not and should not be Precluded by Past or Anticipated Actions of the Federal Communications Commission.

Despite the fact that the FCC itself has made clear that its actions should not "in any way preclude the Department from prosecuting its case or from arranging an appropriate settlement" 18/, CBS has dusted off its well-worn and oft rejected argument that the FCC's actions can and should do just that [CBS Comments at 17-18]. In particular, CBS contends that because the proposed consent Judgment does not adjudicate the illegality under the antitrust laws of NBC's

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17/ Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972), citing International Salt Co. v. United States, 332 U.S. at 401; United States v. DuPont & Co., 353 U.S. 586, 608 (1957); United States v. Crescent Amusement Co., 323 U.S. 173, 185 (1944). See United States v. Glaxo Group, Ltd., supra, at 64.

18/ Notice of Inquiry, In the Matter of Commercial Television Network Practice and the Ability of Station Licensees to Serve the Public Interest, Docket No. 21049, January 14, 1977 ("Notice of Inquiry"), at Par. 5, 42 Fed. Reg. 4992. See also the FCC Memorandum to the Court in this litigation, January 11, 1973.

past conduct, this litigation should not be settled, but should instead be referred to the FCC for some uncertain resolution at some undetermined date. While a consent Judgment does not, by definition, adjudicate any issue of law, this Judgment's provisions are fashioned so as to prevent the continuation of conduct which the Complaint charged was anticompetitive. The cases against CBS and ABC are proceeding to trial because the Court has repeatedly determined that it has jurisdiction to fashion relief against their alleged antitrust violations. It would be strange indeed if, because NBC has agreed to settle its own litigation, that fact and the nature of the relief achieved could deprive the Court of its jurisdiction in this action.

CBS further argues that entry of the provisions of the decree would duplicate, overlap and collide with the FCC regulatory scheme. [CBS Comments at 18]. Yet, no examples of actual collision between the decree and the regulatory scheme of the FCC are cited. Rather, CBS, as does ABC, attempts to conjure up numerous possible problems with the FCC's new Notice of Inquiry. However, the FCC, which is perfectly capable of speaking for itself, has, as already noted, commented only that its announced inquiry should not be used to "foreclose" the Department of Justice in its antitrust action, or to preclude the Department from arranging "an appropriate settlement." 19/

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19/ Notice of Inquiry, Par. 5, 42 Fed. Reg. at 4992.

CBS also alleges that this Judgment is inconsistent with the FCC rules [CBS Comments at 21-22], but cites Section IV which is completely consistent with and supportive of the FCC's financial interest and syndication rules. [47 C.F.R. §73.658(j)(i)-(ii)]. CBS further contends that Section IV is inconsistent with the FCC's authority because it is not limited in time [CBS Comments at 24-25], but neither are the corresponding FCC rules so limited. If the FCC, after its Notice of Inquiry, were to propose changes in its rules, and if the changes were enacted on a full record, the Court retains jurisdiction in Section XII to consider any appropriate modification of the Judgment, if that were desirable under antitrust standards.

Finally, CBS's contention that the continued production of entertainment programming by the networks was specifically approved by the FCC, is without merit. [CBS Comments, at 25-26]. The FCC did consider a ban on a network's offering any network supplied program to its affiliates during 50% of prime time, and did so because it was concerned with "continuing dominance by network corporations of the television program production and procurement process." 20/ Thereafter, the FCC concluded

20/ The Notice of Proposed Rulemaking, Docket 12782, 45 F.C.C. 2146, 2162 (1965), states:

> Strict adherence to the principle of free competition would perhaps suggest the total elimination of network corporations from production and financial and proprietary control of tele-

that network program production should be limited. 21/ This is precisely what Section V of the proposed Judgment would

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20/ continued

vision programming. However, the record of the Program Inquiry and our general knowledge of the situation as it currently exists in network television leads us to the view that the public interest in a nationwide television structure sustained by network program service would not be furthered by eliminating network corporations entirely from the program production and procurement process. We are persuaded that, in order reasonably to insure the quantity and quality of television programming necessary to maintain adequate community service, network corporations should be permitted to engage to a substantial but limited degree in program production, procurement and financing. On the other hand, it is our tentative view that to permit continuing dominance by network corporations of the television program production and procurement processes as disclosed by the record of our Inquiry not only would injure the public interest in a competitive national television structure but also would act as a stricture on the "larger and more effective" use of television channels in the public interest.

21/ The FCC considered prohibiting each network from producing, procuring or financing entertainment programs

accomplish. Significantly, the FCC has not objected to the proposed production limitation of Section V, but merely sought comment on that provision among others in its recently instituted inquiry into commercial television network practices. 22/

D. Retention of Jurisdiction by the Court is Standard Practice in Antitrust Cases and Should Not Preclude Entry of the Proposed Judgment.

CBS asserts that entry of this Judgment is not in the public interest because the Court would have to maintain continuous supervision of it. [CBS Comments at 20-21]. Of course, all antitrust judgments provide that the Court retains jurisdiction over the subject matter thereof, and

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21/ continued

during 50% of all prime time hours. Ultimately, in 1970, the FCC prohibited each network from originating any entertainment program during one hour of prime time, prohibited network acquisition of subsidiary interests or profit shares and prohibited each network from engaging in domestic syndication of television programming. These prohibitions are commonly referred to as the Prime Time Access, Financial Interest and Syndication Rules, 47 C.F.R. §73.658(j) (1975). [Report and Order, Docket No. 12782, 23 F.C.C. 2d 382, 384 (1970), aff'd sub nom. Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 482 (2d Cir. 1971)].

22/ See Notice of Inquiry, par. 23, 42 Fed. Reg. at 4995.

this case is no exception. The Court, once it recognizes its jurisdictional duty, has no other choice. If Courts refused to consider or enter judgments in antitrust cases simply because to do so might be burdensome, few antitrust cases would be successfully concluded. In any event, the provisions of this Judgment will not prove to be unduly burdensome to the Court. Many of its provisions are limited to terms of 15 years or less 23/, for the express purpose of not burdening the Court with matters which may prove to be temporal. Only Sections IV(A), IV(B), VI(A) and VI(B), which embody general antitrust principles, have no time limitations. However, none of the Judgment provisions call for the type of Court supervision that evolved in United States v. Paramount, 1948-49 Trade Cas. ¶62,377 (S.D.N.Y. 1949), or in United States v. ASCAP, 1940-43 Trade Cas. ¶56,104 (S.D.N.Y. 1941).

An examination of the Paramount and ASCAP decrees quickly reveals features which substantially distinguish them from this proposed Judgment. The RKO decree 24/, for example, enjoined defendant:

> From acquiring a beneficial interest in any theatre, other than those named [in

23/ Sections V, VI(C), VI(D), VI(E), VI(F) and VI(G) are all effective only for fifteen years or less.

24/ United States v. Paramount Pictures, 1948-49 Trade Cas. ¶62,335 (S.D.N.Y. 1948). (The RKO decree is one of the Paramount decrees.)

> the decree] unless the acquiring defendant shall show to the satisfaction of the court and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures (emphasis added). [1948-49 Trade Cas. at 62,886]. 25/

The ASCAP decree calls for extensive judicial review of proposed license fees to be paid applicants. 26/ Section IX provides, in part:

> If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee . . . . [1950-51 Trade Cas. at 63,754].

These two provisions, which resulted in much of the post-Judgment litigation under those decrees, have no counterpart in the NBC Judgment. Here, the Court would not be required to pass on each and every transaction, or indeed any transaction, engaged in by NBC. This substantial distinguishing difference

25/ Also see United States v. Paramount Pictures, 1948-49 Trade Cas. ¶62,377 (S.D.N.Y. 1949) (the Paramount Decree). Paragraph III.A.6(a)(iii-iv) and (b) are to similar effect as the RKO decree.

26/ United States v. ASCAP, supra, as amended United States v. ASCAP, 1950-51 Trade Cas. ¶62,595 (1950).

between the judgments cited by CBS and the proposed NBC Judgment demonstrates that the extensive Court oversight envisaged by CBS is a myth.

E. The Proposed Judgment Does Not Violate NBC's First Amendment Right to Free Speech.

Curiously, CBS argues that the Judgment would violate NBC's constitutional right to free speech. [CBS Comments at 30-34]. CBS, however, has no standing to object to an alleged violation of NBC's First Amendment rights. The Courts have long held that persons may not raise or adjudicate the constitutional rights of third parties who have not asserted those rights in their own behalf. Tileston v. Ullman, 318 U.S. 44, 46 (1942); Warth v. Seldin, 422 U.S. 490, 509-510 (1975); Paton v. LaPrade, 524 F.2d 862, 874 (3d Cir. 1975). In any event, there is no First Amendment issue in this proceeding.

CBS argues that this Judgment would infringe First Amendment rights because, as a broadcaster, a network is immune from prosecution under the Sherman Act. However, the First Amendment affords no antitrust immunity for businesses such as newspaper publishing or broadcasting. In Associated Press v. United States, 326 U.S. 1 (1945), the Court denied outright Associated Press' argument for immunity. Justice Black, writing for the Court, stated:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity. [326 U.S. at 20].

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In addition, the Supreme Court similarly denied a claim for unlimited immunity by a broadcaster in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), where the Court stated that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [395 U.S. at 388]. See Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101-103 (1973). Unfortunately, NBC's network cannot be used by all who would desire to do so. National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 226 (1943). Certainly, it cannot be used by NBC to restrain or monopolize a substantial part of trade and commerce.

Further, in the case of United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), the Supreme Court, overriding a similar First Amendment challenge, held that in the face of a restraint of trade, it was proper to prohibit movie distributors from integration into the related business of exhibition. [334 U.S. at 170-175]. Subsequently, the District Court ordered that the theatre circuits of each defendant be divested from their production and distribution

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arms. [85 F.Supp. 881, 895-896 (S.D.N.Y. 1949)]. While not totally precluding such integration, the proposed Judgment in this case seeks to insure that there will be no abuse flowing from NBC's limited production of programs and that total engrossment of its entertainment program production by NBC cannot occur.

CBS raised the same First Amendment claim when the FCC imposed the prime time access rule which prohibited each network's affiliates in the top fifty markets from accepting network originated programming for an hour period each night. It said this constituted an absolute ban on network "speech." The Second Circuit expressly considered and rejected CBS's claimed infringement, stating:

> The unique structure of the broadcast media requires a determination as to who will have priority in the exercise of First Amendment rights when there is a potential conflict in the operation of the industry. The Supreme Court has ruled that the public's right to access must prevail over all other claims. . . . [Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971)].

Plaintiff can conceive of no more serious restriction on free speech than acceptance of CBS's argument that it, NBC and ABC should be permitted to produce all of the television programming broadcast on their respective networks, totally foreclosing all independent program suppliers from their nationwide chains of affiliated stations. This Judgment, rather than infringing on constitutional rights, seeks to insure that no such infringement is possible.

II. The Competitive Impact Statement Satisfactorily Complies With the Requirements of the Antitrust Procedures and Penalties Act.

CBS seeks to bolster its opposition to entry of the Judgment by alleging that the CIS does not satisfy the requirements of the APPA [CBS Comments at 34-46]. Upon analysis, however, CBS's entire argument is the same as that raised in an earlier portion of its comments; that is, that entry of the Judgment would be anticompetitive because no valid antitrust claim is asserted by the complaints. [CBS Comments at 4-17, 40-44]. However, the Government has alleged serious violations of the antitrust laws, and this Judgment seeks to neutralize those violations. That CBS does not presently concede the validity of the Government's claims is understandable, but not persuasive. Since the competitive effects of this Judgment, as well as the nature and purpose of the case were fully discussed above, no further response is deemed necessary.

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February 25, 1977

BY HAND

Bernard M. Hollander, Esquire
Department of Justice
Antitrust Division
Room 3222
Washington, D.C. 20530

Re: United States v. National Broadcasting Company, Inc. (Civil No. 74-3601-RJK, C.D. Cal.)

Dear Mr. Hollander:

Pursuant to 15 U.S.C., Section 16(d)(Supp. 1976) and the order of the court extending the time within which comments may be submitted to and including March 1, 1977, enclosed are copies of ABC's Comments on the Proposed NBC Consent Decree.

Very truly yours,

Daniel H. Margolis

Daniel H. Margolis

DHM:jc

Enclosures

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DEPARTMENT OF JUSTICE
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ANTITRUST

60-211-62

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., Defendant.	Civil Action No. 74-3601-RJK

COMMENTS OF AMERICAN BROADCASTING COMPANIES, INC. ON THE PROPOSED NBC CONSENT DECREE

American Broadcasting Companies, Inc. ("ABC") submits these comments pursuant to the Antitrust Procedures and Penalties Act[1/] ("APPA"), with respect to the proposed consent decree filed in this case on November 17, 1976.[2/]

Companion civil suits brought by the Antitrust Division of the Department of Justice ("the Department") are pending against ABC and CBS Inc.,[3/] both of which operate national

1/ 15 U.S.C. § 16(b)(Supp. 1976).

2/ Proposed Consent Judgment, 41 Fed. Reg. 51992 (1976); United States v. National Broadcasting Co., Civil Action No. 74-3601-RJK (C.D. Cal., Complaint filed December 10, 1974).

3/ United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK (C.D. Cal., filed December 10, 1974); United States v. CBS Inc., Civil Action No. 74-3599-RJK (C.D. Cal., filed December 10, 1974).

commercial television networks in competition with NBC. These suits challenge the same network conduct and practices which are alleged to be unlawful in the suit against NBC. Some of the provisions of the proposed decree will not become effective unless similar relief is obtained against ABC (and CBS).[4/]

ABC has been vigorously defending, and will continue to defend, the action pending against it. Because ABC believes that the Government's allegations are utterly without merit, and that the Court should dismiss these actions on jurisdictional as well as other grounds, ABC is moved to submit these comments with respect to the proposed decree in the pending action against NBC.

Before this proposed consent decree may be entered, the Court is required by statute to determine that its entry "is in the public interest."[5/] For the reasons explained in the comments

4/ Competitive Impact Statement, 41 Fed. Reg. 52015 (1976) [hereinafter cited as "Impact Statement"]. Section VII of the proposed decree suspends the effectiveness of several provisions of the decree "until similar injunctive relief is obtained in Final Orders, Judgments or Decrees" entered against CBS and ABC. The suspended provisions are as follows: V, VI(C), VI(E)(i), and VI(F) through (H). Proposed Consent Judgment, 41 Fed. Reg. 51992, 52007-08 (1976). Also, if a final order is entered against either CBS or ABC that places NBC "at a competitive disadvantage," Section IX of the decree requires the Court to modify or exempt NBC from any provision of the proposed decree "as may be necessary to prevent NBC from being placed at a competitive disadvantage with respect to CBS or ABC." Proposed Consent Judgment, 41 Fed. Reg. 51992, 52009 (1976).

5/ 15 U.S.C. § 16(e)(Supp. 1976).

which follow, ABC submits that the Government should withdraw its consent to the proposed decree; and if the Government declines to do this, then the Court should reject the decree as not in the public interest. In brief, the reasons for ABC's position are as follows.

FIRST, this decree would superimpose inflexible, judicially fashioned regulations on an industry already subject to pervasive and ongoing regulatory control by the FCC. The Court can neither make the required public interest determination, nor administer the decree, without duplicating the FCC's role and conflicting with the FCC's authority.

A. The proposed decree is entirely regulatory in nature. If entered it will substantially, directly, and unnecessarily impinge on a recently commenced FCC proceeding encompassing precisely the same allegedly anticompetitive network practices, policies and conduct. See Notice of Inquiry, Docket No. 21049 (In the Matter of Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest), released January 14, 1977, 42 Fed. Reg. 4992 (1977).

B. Thus, in this respect the Court is confronted with a dilemma: Either the Court must evaluate

and administer the decree under the FCC's view of the public interest, which would be redundant, or the Court must create and adopt its own, different and inevitably conflicting version of the public interest.

SECOND, Congress has charged the FCC with the responsibility and granted it the power and authority to regulate the broadcast industry in accordance with the "public interest, convenience and necessity."[6/] While the Court may have power to adjudicate antitrust issues and determine antitrust liability, the FCC has concurrent power and its "regulatory scheme is broad enough to comprehend the subject matter of this litigation."[7/] Moreover, the FCC's power to regulate is not dependent upon a determination that a particular practice violates the antitrust laws. Therefore, it would be unwise, unnecessary and contrary to the public interest for the Court in the first instance, and without regard to an ongoing FCC proceeding covering the same subjects, to attempt to regulate the matters covered by the proposed decree.

A. The Department of Justice could request the FCC to exercise its authority to remedy the alleged anticompetitive

6/ 47 U.S.C. § 309 (1970).

7/ United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK slip op. at 6 (C.D. Cal. February 16, 1977).

network conduct and practices by promulgating rules identical to those embodied in the proposed consent decree. The FCC is both competent and required to weigh antitrust as well as other concerns in regulating the broadcast industry.

B. If the Court enters the proposed consent decree, it will necessarily become enmeshed in an enduring and burdensome task of regulation and industry administration.

C. There is no legal or practical reason why the Court should become involved at this time in attempting to regulate the television broadcasting industry. Accommodation of antitrust policies to FCC policies requires the Court at least to await the outcome of the pending FCC inquiry before undertaking to determine whether the provisions of the proposed consent decree are in the "public interest."

THIRD, the FCC's congressionally mandated jurisdiction over the subject areas of the proposed decree may not be ignored or defeated by a mere stipulation of the parties purporting to transfer the FCC's regulatory functions to the Court. The Department's only

justification for invoking the jurisdiction of the Court, rather than the jurisdiction of the FCC, is that the FCC does not have the power also to determine that the challenged network conduct was in violation of the antitrust laws, although its remedial powers are concededly at least as broad as the Court's. The decree which the Department of Justice has now submitted to the Court for approval, however, is a consent judgment. By its terms, the Court expressly refrains from making any finding that NBC's conduct or practices violated the antitrust laws.[8/] Hence, the Government's purported jurisdictional premise no longer exists. Since the Government is willing to accept a consent decree absent a finding of antitrust liability, the question whether the regulatory provisions of the proposed decree are in the "public interest" should now be referred, at least initially, to the agency specifically empowered by Congress to deal with such matters.

8/ The proposed consent decree provides that the parties consent to the entry of judgment

> without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding. . . .

Proposed Consent Judgment, 41 Fed. Reg. 51992, 51995 (1976) (emphasis added).

I.

Entry of the Proposed Decree Will Inevitably Involve the Court in Duplicating the FCC's Role and Conflicting with the FCC's Authority

A. The Decree is Entirely Regulatory in Nature.

In the Competitive Impact Statement filed pursuant to Section 2(b) of the APPA, the Government presents (without any factual support) the following statement of the nature and purpose of the proposed consent decree.

> The structure of the market is such that each of three networks controls program producers' and advertisers' access to the nation's commercial television audiences and each network has abused its power by refusing access to programs which it did not produce or in which it had no financial interest. Consequently, the only meaningful relief that can be obtained short of restructuring the networks is to limit network program production and restrict the program rights that each network may obtain from outside suppliers to the rights essential to networking, which are those incident to the right to exhibit the program. This the proposed NBC judgment seeks to do. It would establish specific outer limits on NBC's own program production and on the type of rights and interests which NBC may acquire from independent program suppliers in addition to the right of network exhibition. 9/

The Government admits that "many" of the proposed decree's injunctive provisions are of a "regulatory nature." 10/ The actual extent to which those provisions are indeed identical to already promulgated FCC rules, or would affect the precise network policies and practices which are the subject of a new

9/ Impact Statement, supra note 4, at 52021.

10/ Id. at 52023.

and comprehensive FCC inquiry, 11/ is startling. Thus:

(1) Section IV of the proposed decree embodies, without material alteration, the FCC's existing financial interest and syndication rules. 12/

The FCC's Notice of Inquiry in Docket 21049 (released January 14, 1977) recognizes this, but indicates that these present rules may be modified as a result of its current inquiry "if that appears to be warranted."

> The proposed NBC consent decree contains terms . . . virtually identical to [the Commission's financial interest and syndication rules] . . . . We invite interested parties to comment on the adequacy of our present rules and to propose alternatives if that appears to be warranted. 13/

(2) Section V of the proposed decree restricts the number of hours of NBC-produced entertainment programming that NBC may schedule each week. 14/ The Government argues in the Competitive Impact Statement that this will eliminate

11/ See Notice of Inquiry, Docket No. 21049 (In the Matter of Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest), released January 14, 1977, 42 Fed. Reg. 4992 (1977) [hereinafter cited as "Notice of Inquiry in Docket No. 21049"].

12/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 51998-99 (1976).

13/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4995.

14/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 51999-52000 (1976).

"the possibility that NBC could substantially increase its internal production . . . and thereby exclude independent program suppliers."[15/]

The FCC's Notice of Inquiry in Docket 21049, however, indicates that the Commission is considering regulation in the same area, although expressly recognizing that this is an issue in this antitrust action.

> Although most network entertainment programs are acquired from outside producers, a small number have been and are produced entirely by the networks themselves. This was one subject of the Department of Justice's antitrust action. The Department's position (as set forth in its competitive impact statement filed with the NBC consent decree) is that, just as with programs produced by others but in which the network acquires subsidiary rights, there arises a network predisposition to use such material regardless of its merit, and independent producers are thus unduly excluded from the network program market. Other parties have alleged that the unlimited network potential for producing their own entertainment programs can be used to obtain first-run programming at unreasonably low prices. While we are not concerned with the profits of program producers as such, we are interested in the question of whether this factor gives the networks an anticompetitive advantage over potential competitors, and whether the advantage works to limit the supply of independently produced programs. 16/

15/ Impact Statement, supra note 4, at 52022.

16/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4995.

(3) Section VI(B) of the proposed decree enjoins NBC, in connection with its acquisition of network exhibition rights, from requiring a program supplier to use NBC production facilities; and Section VI(C) prohibits NBC from leasing facilities for the production of a filmed or taped program for a period longer than the time needed to produce episodes for one season.[17/]

In its Notice of Inquiry in Docket 21049, the FCC notes that independent production companies have periodically maintained that networks condition the purchase of a program on the use of network-owned production facilities, and then suggests

> that commenting parties address themselves to the question of whether such arrangements to the extent that they exist, may affect competition in the offering of program production facilities. 18/

(4) Section VI(E)(i) of the proposed decree reduces to three the number of annual renewal options that NBC may initially acquire on a series program.[19/] The Government purports to justify this restriction on the ground that it "is

17/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52000-01 (1976).

18/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4995.

19/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52001-02 (1976).

designed to restrict NBC's present ability to obtain exclusive rights to a program series for as long as seven years on terms and conditions set before the program has ever been developed."[20/]

The Notice of Inquiry in Docket 21049 addresses the identical question.

> It is also alleged that the networks commonly demand options on exhibition rights for as much as five to seven years following the development of a script or program pilot, thereby precluding competition in bidding for the rights to a program which develops into a highly successful series. We invite comments on the effects which such practices could have on competition. . . . [21/]

(5) Section VI(F) of the proposed decree requires NBC to release every pilot it has not financed by the earliest date on which an episode of the contemplated series may be broadcast under the series development contract.[22/] Upon payment of its unrecouped development investment, NBC must release 65% of the pilots it has financed but does not select for broadcast within three to nine months after delivery.[23/] NBC

20/ Impact Statement, supra note 4, at 52025.

21/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4995.

22/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52004-06 (1976).

23/ Id. at 52005.

must release the balance of the pilots it has financed within one year.[24/]

In its Competitive Impact Statement, the Government contends that this provision "would permit increased competition between the networks by freeing the producers of as many as 65% of the program pilots not selected by NBC to offer their pilots to other networks or television stations."[25/]

The FCC's Notice of Inquiry in Docket 21049 addresses the same issue, asking whether

> some present practices unduly restrict the release of a significant number of pilots for further development and thereby limit the amount of first-run material available for syndication, and whether this programming might, in some instances, provide viable competition to network offerings. [26/]

(6) Section VI(H) of the proposed decree generally prohibits NBC from acquiring the right to repeat a series episode after the season in which it was first broadcast.[27/] NBC may, however, acquire the right to choose three new episodes

24/ Id.

25/ Impact Statement, supra note 4, at 52026.

26/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4996.

27/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52007 (1976).

each season and repeat these episodes in later seasons.[28/] Section VI(H) does not apply to cartoon or other children's series.[29/]

The FCC's Notice of Inquiry in Docket 21049 expressly notes that

> [t]he Department of Justice has raised a question as to whether limitations should be placed on the ability of networks to secure exclusive rights to rebroadcast episodes originally shown in a previous television season. 30/

It then invites comments on the need for restrictions on this practice.[31/]

(7) Section VI(E)(ii) of the proposed decree limits the duration of NBC's exclusivity rights against non-network stripping during daytime and fringe time to four years from the date the first episode of the series is broadcast.[32/] Against all other broadcast uses during day time and fringe time, such as daytime network stripping, Section VI(E)(ii) limits exclusivity to three years from that date.[33/]

28/ Id.

29/ Id.

30/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4996.

31/ Id.

32/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52002-03 (1976).

33/ Id. at 52003.

Section VI(G) of the proposed decree limits NBC to first negotiation/first refusal rights in a spin-off involving a non-continuing character (one who appears in no more than 25 percent of the previous year's episodes).[34/]

Although neither exclusivity as applied to non-network stripping nor first refusal rights in spin-offs is expressly referred to in the Notice of Inquiry in Docket 21049, these issues are within the ambit of the FCC's inquiry "whether the networks have maintained anticompetitive policies which unduly restrict the development of other programming sources."[35/] Thus, the Notice of Inquiry observes that

> [i]t is obvious, of course, that the categories of questions concerning network-affiliate relations and network-program supplier relations are far from being mutually exclusive. Developments in one area can and generally do impact on the other. 36/

(8) Section VI(E)(iii) of the proposed decree prohibits NBC from acquiring any exclusive rights in a theatrical feature film against methods of exhibition other than pay or subscription television.[37/]

34/ Id. at 52006-07.

35/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4992.

36/ Id. at 4992-93.

37/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52003-04 (1976).

With respect to pay or subscription television use, Section VI(E)(iii) limits the duration of NBC's exclusive rights in a film to 25 months (plus one year for each run beyond two acquired by NBC), commencing no earlier than thirty days prior to the film's availability to NBC for use on the NBC network.[38/]

The question of the extent to which the commercial television networks need exclusive rights with respect to theatrical feature films as against subscription television is presently under investigation by the FCC in a proceeding commenced on March 20, 1975.[39/] The Notice of Inquiry in that proceeding states that

> [t]he second major focus of this inquiry concerns the question of what measure of contractual exclusivity, if any, is appropriate as between the conventional and subscription television services. [40/]

The Commission then specifically asks for comments as to: "What are the relevant anti-trust implications of existing or foreseeable exclusivity arrangements?"[41/] It invites comments on the need for restrictions on this practice.[42/]

30/ Id. at 52004.

39/ FCC Docket No. 20402.

40/ Notice of Inquiry, Docket No. 20402, 52 F.C.C.2d 87, 90 (1975).

41/ Id. at 92.

42/ Id. at 91.

Thus, the decree which the Court has been asked to evaluate and enter is the precise subject of comprehensive regulatory FCC investigations.

B. The Proposed Decree Confronts the Court with A Dilemma: Either it Must Evaluate and Administer the Decree Under the FCC's View of the Public Interest, Which Would be Redundant, or it Must Create and Adopt Its Own, Conflicting Version of the Public Interest.

Before entering the proposed consent judgment, the Court must find pursuant to Section 2(e) of the APPA that the decree is in the public interest. But what public interest standard is to be applied in making this determination?

In light of the breadth of the FCC's concern, and the many interests it must take into account, the Court might be constrained to evaluate, enter and attempt to administer the proposed decree in accord with the FCC's public interest standard, accepting those provisions which conform, rejecting those which do not. That would seem to minimize disruption of the FCC's regulatory plan. But merely duplicating an existing regulatory regime hardly serves any cognizable public interest. And because the decree is regulatory and essentially prospective in nature, attempting to mimick the FCC would be expensive and difficult to accomplish.

In the first place, the Court would have to determine in each instance how the FCC would interpret the public interest. While that may be apparent when the FCC has issued specific regulations covering the matters in issue, when the FCC has not formulated a clear policy or has not given it concrete expres-

sion -- such as in the critical area of network production of television programming -- the Court would have to wait for the FCC to develop a position (or engage in guesswork) before duplicating the result the FCC would reach under the same circumstances.

In the second place, the Court will have to keep up with the FCC. As we have observed, the FCC is currently investigating the television industry to determine whether, considering the issues raised by the antitrust complaints, its existing regulatory scheme best serves the public interest. It is possible that, after investigation, which the FCC predicts may take a year, the FCC may find the public interest requires that it vary the current regulations as to syndication by and financial interests of networks, for example, or it may create new regulations or determine that regulation is not in the public interest. Any addition to, subtraction from or variation by the FCC of its rules would be based on a determination that the existing rules do not serve the public interest as adequately as the proposed variation. In such a case, the Court would be faced with the unenviable choice between modifying the NBC decree to follow the FCC rules revision (thus pointing up the meaninglessness of a judicial decree on the same subject) or declining to modify the decree (thus without the benefit of any evidentiary record both disagreeing with the expert agency designated by Congress to deal with this industry as to what

was "in the public interest" and imposing inconsistent requirements on NBC which are likely to interfere with the effectiveness of the FCC's pervasive regulatory scheme).

Alternatively, rather than attempting to follow the FCC, the Court may be constrained to evaluate, enter and administer the decree according to its own, distinct conception of the public interest. While there are innumerable other ways of defining or giving different emphasis to elements of the public interest, using this decree to give different concerns a greater role in broadcast regulation would be wrong for a number of reasons.

As the Court suggested in denying the networks' 1972 motions for a stay, to second guess the FCC by administering the decree according to a conflicting interpretation of the public interest would subvert the purpose of administrative agencies. The Court stated:

> Nevertheless, assuming antitrust violations are proven, accommodation of antitrust policies to F.C.C. policy in terms of remedies will be a real and substantial problem. Accordingly, the court will give great weight to the F.C.C. rules in the event that it becomes necessary to afford to plaintiff a remedy. This caveat, as a practical matter, might render the prosecution of these cases unnecessary, but that is for others than the court to decide. 43/

Equally significantly, second guessing the FCC would exceed the appropriate role of a reviewing court. By statute, exclusive jurisdiction to review final orders of the FCC is lodged in

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43/ United States v. National Broadcasting Co., 1974 Trade Cas. ¶ 74,885, at 95,992 (C.D. Cal. 1973).

the courts of appeals, not the district courts.[44/] And, the scope of appellate review of FCC orders is narrow. FCC action must be sustained if it is "based upon findings supported by evidence"; trial de novo of the matters considered by the Commission is improper.[45/] It is equally improper for the reviewing court to consider whether the FCC correctly weighed and balanced the conflicting factors it took into account in determining that its actions served the public interest. As the Supreme Court stated in upholding the programming origination rules the Commission applied to cable, "[i]t was, of course, beyond the competence of the Court of Appeals itself to assess the relative risks and benefits of cablecasting."[46/]

The reason for the limited role of a reviewing court lies in the expertise of administrative agencies. The FCC was created to regulate the communications industry. After more than a generation in that role, the Commission has developed expertise in that field and of course has been funded and staffed to maintain that expertise. The judiciary does not possess those resources. The Court of Appeals for the Second Circuit recognized this in upholding the FCC's second modification of the prime time access rule.

44/ 28 U.S.C. § 2342 (Supp. 1976); 47 U.S.C. § 402(a)(1970).

45/ National Broadcasting Co. v. United States, 319 U.S. 190, 224, 227 (1943).

46/ United States v. Midwest Video Corp., 406 U.S. 649, 674 (1972).

> The issue of whether network dominance has actually increased under [the original prime time access rule] is peculiarly within the competence of the Commission, which has access to all phases of the industry and has conducted hearings not only under this docket but under related dockets as well. We cannot, as a reviewing court, determine de novo the relative weight of the several conflicting economic factors that should be considered. 47/

The Court, therefore, would effectively circumvent the permissible bounds of judicial review of agency action if it decided to administer the proposed decree according to a different standard from the one employed by the FCC. As a matter of public policy and the proper allocation of responsibilities between court and agency, the weighing and balancing of factors involved in formulating the public interest in broadcast regulation must be left exclusively to the FCC.

Moreover, if the Court evaluates the decree according to a standard different from the FCC's, unless that evaluation results in rejection of the decree, the networks will a fortiori be caught between inconsistent regulatory schemes. Indeed, the Court took note of this problem in its Memorandum of Decision and Order filed February 16, 1977, denying the defendant's motion to dismiss.

> . . . [I]mposition of the remedies requested by the government in this action may conflict with the directives of the FCC's regulations, thereby subjecting the networks to varying standards of conduct. 48/

47/ National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 534 (2d Cir. 1975). See also Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 481-82 (2d Cir. 1971).

48/ United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK slip op. at 9 (C.D. Cal. February 16, 1977).

And it is reasonable to predict that the burden and unfairness of this inconsistency will not be confined to an occasional instance. In many practical respects, important provisions of the proposed decree overlap, duplicate and are inconsistent with the FCC's already existing regulatory scheme. We discuss three of these.

1. Limitations on Production.

Part V of the proposed consent decree would prevent NBC from producing more than 2-1/2 hours per week of its own prime time entertainment programming.[49/] Thus, regardless of marketplace circumstance, NBC would be forced to fill at least approximately 90% of its prime time entertainment programming needs from outside sources. Additional restraints would apply to daytime and fringe time programming.[50/]

The Government claims in its Competitive Impact Statement that there is a predisposition by networks to use their own programming which forecloses outside suppliers of programs.[51/]

49/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 51999 (1976).

50/ Id. at 51999-52000.

51/ In its Competitive Impact Statement, the Department states that the proposed decree

> would establish specific outer limits on NBC's own program production and on the type of rights and interests which NBC may acquire from independent program suppliers in addition to the right of network exhibition. This should minimize NBC's incentive to select a program on the basis of financial interests in it.

Impact Statement, supra note 4, at 52021.

The FCC considered this contention when it declined to adopt the "50/50" rule, which would have limited network-originated programs in prime time to 50% or 14 hours per week.[52/] The proposal had a purpose similar to the instant provision:

> to restrain network domination of nighttime television and to open access to the valuable nighttime hours to independent producers. 53/

As the Commission noted, however, in rejecting the 50/50 rule,

> the public interest . . . would not be furthered by eliminating network corporations entirely from the program production . . . process. We are persuaded that, in order reasonably to insure the quantity and quality of television programming necessary to maintain adequate community service, network corporations should be permitted to engage to a substantial but limited degree in program production 54/

The Commission chose instead to adopt the prime time access rule, as an alternative solution to the same alleged problem.[55/] The Commission explained its decision in part on the ground that networks might not be able to secure sufficient product from independent sources to fill their schedules, and thus might be damaged competitively by a limitation on internal

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52/ Notice of Proposed Rule Making, Docket No. 12782, 4 R.R.2d 1589, 1611 (1965) [hereinafter cited as "Notice in Docket No. 12782"].

53/ Report and Order, Docket No. 12782, 23 F.C.C.2d 382, 384 (1970).

54/ Notice in Docket No. 12782, supra note 52, at 1611.

55/ Report and Order, Docket No. 12782, supra note 53, at 383-84.

production.[56/] The FCC expressly left open for future consideration in the light of experience whether the institution of the 50/50 proposal or some other variation was necessary, and consistent with that continuing responsibility, this is precisely what the FCC is now undertaking to do in its new investigation.[57/]

By consenting to the proposed decree, which permits some production, the Department of Justice has conceded agreement with the position of the FCC that networks "should be permitted to engage to a substantial but limited degree in program production. . . ."[58/] Thus the question is no longer whether a network may, consistent with the antitrust laws, produce its own entertainment programming. The only issue now is whether any limitation on network production is necessary in the public interest.

From an economic and competitive standpoint, production limitations such as those in the proposed decree are clearly contrary to the public interest. They curtail network flexibility to create new and innovative programs and to schedule network produced programming during periods of short supply. The integration of television program suppliers into the business of networking, coupled with increasing competition from other purchasers of such programming has made the continued

56/ Id. at 384, n.6.

57/ See supra pp. 8-15.

58/ Notice in Docket No. 12782, supra note 52, at 1611.

availability of an adequate supply of high quality programming from non-network sources highly uncertain and unpredictable.

Some recent examples of developments which threaten to diminish the supply of quality programming available to networks from outside sources include the following:

(a) Paramount Pictures Corporation, a subsidiary of the conglomerate, Gulf & Western Industries, Inc., aided and encouraged by its joint venture connections with Sony Corporation of America, is reported to have acquired the Hughes Television Network and to have signed a $2.8 million agreement to expand the network's delivery capabilities via satellite to virtually 24 hours a day.[59/]

(b) MCA/Universal, the largest supplier of television programming to networks, has agreed with a pool of affiliated and independent television stations to produce made-for-television movies and distribute them directly to the stations, bypassing the networks.[60/] MCA's first offering, an eight-hour first-run mini series, was commissioned by over 50 stations and is scheduled to begin airing in May, 1977. One licensee is reported to have characterized this activity as an "explosion" caused by "Hollywood production studios, as well as advertisers, [who] were anxious to open markets other than those afforded by ABC, CBS and NBC."[61/]

59/ Variety, December 29, 1976, at 33, Col. 1; Broadcasting, January 31, 1977, at 62, Col. 1.

60/ Variety, December 22, 1976, at 75, Col. 2.

61/ Broadcasting, January 24, 1977, at 21, Col. 1; The New York Times, January 19, 1977, at 22, Col. 1.

(c) Metromedia Television and a major advertising agency have announced plans to offer stations prime time programming five nights a week beginning in October, 1977 with thirty minutes a night, but planning to expand upwards.[62/] The plan was said to be designed to reach 60% of the nation's television households and to include plans for up to three hours of weekend programming.[63/]

(d) Another leading advertising agency plans soon to announce an offering of Sunday programming from 7-9 p.m., also developed in association with Metromedia.[64/]

(e) Norman Lear has indicated he plans to offer an entire evening of Lear-generated programming on Saturday nights as an alternative to the networks, beginning next year.[65/]

Some of these developments present the possibility of fourth (or fifth) networks.[66/] They all present serious threats of curtailing the outside supply of important programming available to the existing networks. While they may represent legitimate competitive efforts, they underscore the undesirability of placing artificial and inflexible restraints on the

62/ Broadcasting, January 24, 1977, at 20, Col. 3; The Washington Post, January 18, 1977, at B1, Col. 1; The New York Times, January 24, 1977, at 38, Col. 3.

63/ The New York Times, January 24, 1977, at 38, Col. 3; The Washington Post, January 18, 1977, at B4, Col. 1-2.

64/ Broadcasting, January 24, 1977, at 20, Col. 3.

65/ Id.

66/ The New York Times, January 19, 1977, at 22, Col. 1.

networks ability to produce their own programs.

Furthermore, the production limitations contravene established antitrust policies favoring business growth through internal expansion. Vertical integration through internal expansion is prima facie lawful under the antitrust laws, particularly because entering a new phase of production or distribution necessarily results in the addition of a new competitor.[67/]

Most importantly, on economic and competitive grounds the production restrictions in the decree are unnecessary. There are natural limitations on network production that inhere in the business of networking. The advertising revenues that a network receives for the commercial time in its programs depend upon the expected audiences of those programs. Because networks compete among themselves and with other media for those audiences, they must include in their schedules only the best programs available, regardless of source.

Ignoring these economic facts of life, the Government argues in its Competitive Impact Statement that the proposed internal production limitations "should minimize NBC's incen-

67/ Ford Motor Co. v. United States, 405 U.S. 562, 568 (1972); Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 1974 Trade Cas. ¶ 74,912 (S.D.N.Y. 1974), aff'd, 501 F.2d 894 (2d Cir. 1974); The Bendix Corp., 77 F.T.C. 731 (1970), rev'd on other grounds, 450 F.2d 534 (6th Cir. 1971); Hiland Dairy, Inc. v. Kroger Co., 274 F. Supp. 966 (E.D. Mo. 1967), aff'd, 402 F.2d 968 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969). See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 1977 Trade Cas. ¶ 61,255 (U.S. January 25, 1977).

tive to select a program on the basis of financial interests in it" and will eliminate "the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers."[68/] That, however, is the same argument which was raised and rejected in Columbia Pictures Indus., Inc. v. American Broadcasting Cos.[69/] In that case the major producers and suppliers of television entertainment programming sought to enjoin ABC from offering for telecast theatrical feature films produced by ABC. The majors argued that "[b]y its own evaluations [of feature films being considered for broadcast], ABC creams the product of its competitor-suppliers and accepts the mediocre product of its own."[70/] In denying the producers' motion for a preliminary injunction, however, Judge Palmieri found that "the intense nature of the competition between the networks for television audiences"[71/] effectively prevents a network from discriminating

68/ Impact Statement, supra note 4, at 52021-22.

69/ Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 1974 Trade Cas. ¶ 74,912 (S.D.N.Y. 1974), aff'd, 501 F.2d 894 (2d Cir. 1974).

70/ Memorandum of Law in Support of Plaintiffs' Motion for Temporary Relief Against ABC's Exhibition of Its Own Films on Its Own Network, July 3, 1973, at 31, Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 70 Civ. 4202 (S.D.N.Y., filed September 28, 1970).

71/ Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 1974 Trade Cas. ¶74,912, at 96,096 (S.D.N.Y. 1974), aff'd, 501 F.2d 894 (2d Cir. 1974). In affirming Judge Palmieri the Court of Appeals observed that plaintiffs had injected "a 'public interest' argument which, viewed in one light, is as

[continued]

in favor of its own product.

> [T]he Court is not persuaded that ABC . . . has deliberately embarked upon a policy of selecting inferior [self-produced] programming to its own financial advantage and to the prejudice of plaintiffs. The television networks are in vigorous competition with each other. They are engaged in a continuous and lively rivalry for the attention of audiences, which is the very crux of their commercial objectives. The advertising revenue and thus its profits are directly related to and dependent upon the share of the television audience each network can attract with its programming. 72/

Thus, the natural discipline of competition for audiences supplies the only production limitation needed to protect the public interest.

2. Restrictions on Series Options.

The decree's provisions limiting ABC's acquisition of series options to four years (Part VI(E)(i)) also conflict with already existing FCC regulation.[73/] In 1975, the FCC decided to elim-

71/ [Footnote continued from preceding page]

much to say that they believe the public has more of a right to view their films than those of ABC . . . ." 501 F.2d at 896. Moreover, Judge Palmieri had found "[a] persuasive showing has been made . . . that feature film product has been for a number of years in a state of continuing and acute shortage . . . ." 1974 Trade Cas. at 96,094. It has recently been reported that the major theatrical film producers "have slashed their output to a comparative trickle . . ." and ". . . 'a good flow of movies' is impossible with Hollywood's tight fist on the faucet." The Wall Street Journal, February 8, 1977, at 46, Col. 1.

72/ Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 1974 Trade Cas. ¶ 74,912, at 96,095 (S.D.N.Y. 1974), aff'd 501 F.2d 894 (2d Cir. 1974). In this respect the Government's Competitive Impact Statement shows the proposed decree is based on wrong and naive assumptions which are not only lacking in evidentiary support but are also contrary to prior judicial determinations. Impact Statement, supra note 4, at 52018-21.

73/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52001-02 (1976).

nate its restraints on pay cable broadcast of series.[74/] It did so despite the contention that pay cable might siphon off successful conventional television series because it believed that this would not happen in light of the fact that

> almost all network series contracts include a purchase option from one season to another for a period of five or more television seasons . . . . [I]t is likely that the networks will continue to have sufficient leverage to demand and receive similar contract provisions. 75/

Thus, while the FCC clearly viewed siphoning of series by pay cable as an evil to be avoided, it felt that the networks' ability to protect themselves against this eventuality by five year and longer option contracts provided sufficient protection against this evil. By prohibiting such option contracts, the proposed decree would eliminate this protection and open the door to series siphoning by pay cable.

3. Restrictions on Cable Exclusivity.

The proposed decree's provisions as to cable exclusivity (Section VI (E)(iii)(e))[76/] also conflict with Commission regulation. Under the decree, NBC could obtain exclusivity against subscription television of feature films for at most 25 months (for two runs of a film) of which no more than 30 days could

74/ Second Report and Order, Docket No. 19554, 35 R.R.2d 767 (1975).

75/ Id. at 772.

76/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52003-04 (1976).

precede the first date for which NBC held exhibition rights.[77/] Commission regulations, on the other hand, prohibit subscription showing of English language films (i) in the fourth through tenth years following theatrical release unless a broadcaster in the market has a present contractual exhibition right and (ii) after the tenth year if the film has never been shown on the market on a subscription basis, but has been shown on conventional television in the preceding three years.[78/] In promulgating this regulation, the Commission noted that "the public interest in maintaining the conventional television structure has outweighed the interest in unregulated competition."[79/]

Thus two regulatory authorities would attempt to deal with the same alleged problem (conflicts between conventional and subscription broadcasters over rights to television exhibition of feature films) in vastly different ways. And the regulations of the FCC, at least, are subject to change. As indicated earlier, the FCC has now open a proceeding to determine "what measure of contractual exclusivity, if any, is appropriate as between the conventional and subscription television services."[80/] This proceeding may culminate in a rule identical

77/ Id. at 52004.

78/ 47 C.F.R. § 76.225.

79/ First Report and Order, Docket Nos. 19554 and 18893, 52 F.C.C.2d 1, 45 (1975).

80/ Notice of Inquiry, Docket No. 20402, 52 F.C.C.2d 87, 90 (1975). See supra p. 15.

or similar to the decree provision; alternatively, the FCC may determine that no relief, or quite different relief, is dictated by all the public interest considerations involved. In any event, the Commission has made it clear that it is interested in "the relevant anti-trust implications of existing or foreseeable exclusivity arrangements."[81/]

Whatever action the FCC takes in the three areas discussed above, this decree will not further the public interest. If the two forms of regulation coincide, the decree will be superfluous and will merely serve to burden the Court, the parties and the interested members of the industry. If the Commission, applying its public interest standards, orders different relief because, for example, it has considered, in addition to competitive considerations, the importance of maintaining a free television system which is able to present quality programs to the public at no direct cost to viewers,[82/] there will be a regulatory collision.

II.

The Government Has Offered No Reason Why the Court Should Oust the FCC from Jurisdiction

It is unnecessary and would be unwise and contrary to the public interest for the Court to enter the decree and circumvent the FCC, both because the FCC can readily deal with all the

81/ Id. at 92.

82/ See Further Notice of Proposed Rulemaking and Notice of Inquiry, Docket No. 11279, 7 R.R.2d 1501, 1508 (1966); First Report and Order, Docket Nos. 19554 and 18893, 52 F.C.C.2d 1, 45 n. 30 (1975); Notice of Inquiry, Docket No. 20402, 52 F.C.C.2d 87 (1975).

issues raised by this case, including competition, and because the administration of the decree by the Court would be highly burdensome to all concerned. There is no excuse for such waste and burden.

A. In Fulfilling Its Statutory Responsibilities the FCC Is Both Competent and Required to Weigh Competitive and Other Public Interest Concerns.

Competition is a factor which the FCC has consistently weighed in carrying out its statutory mandate. The Communications Act of 1934 requires the FCC, in exercising its authority over broadcasting, to act in accordance with the "public interest, convenience and necessity."[83/] As the Supreme Court has made clear, the phrase "public interest" comprehends the principle of free competition in the broadcasting industry. In FCC v. Sanders Bros. Radio Station,[84/] for example, the Court stated:

> In contradistinction to communication by telephone and telegraph . . . the Communications Act . . . recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads. . . . [85/]

In practice, the FCC has vigorously pursued competitive objectives. The history of Docket 12782, the FCC's earlier, extensive investigation of network contracts and practices,

83/ 47 U.S.C. § 309 (1970).

84/ 309 U.S. 470 (1940).

85/ Id. at 474. Accord, United States v. Radio Corp. of America, 358 U.S. 334 (1959).

supports the FCC's declaration that competition will be a major focus of the FCC's comprehensive new inquiry into the television industry. In the notice of proposed rulemaking in Docket 12782, which culminated in the syndication, financial interest and prime time access rules, the FCC declared:

> The purpose of the rule proposed herein is to foster free competition in television program markets. Specifically, the proposed rule is designed (a) to provide opportunity for entry of more competitive elements into the market for television programs for network exhibition and (b) to encourage the growth of alternate sources of television programs for both network and non-network exhibition. 86/

The FCC entertained the views of, and allowed extensive participation by, the Department of Justice at every stage of Docket 12782.[87/] During the investigation leading to the rulemaking proceeding, the FCC utilized the Antitrust Division's independent investigation of the networks and discussed the proposed rules and supporting data with the Division's staff.[88/] During the rulemaking proceeding itself, the Antitrust Division repeatedly informed the FCC of its belief that its proposed rules would have a beneficial effect on competition.[89/]

86/ Notice in Docket No. 12782, supra note 52, at 1591.

87/ Television Network Program Procurement, Second Interim Report by The Office of Network Study pt. I (1962), reprinted in H.R. Rep. No. 281, 88th Cong., 1st Sess. (1963); Television Network Program Procurement, Second Interim Report by The Office of Network Study pt. II (1965).

88/ Transcript of May 4, 1959, at 13-14, Docket No. 12782.

89/ Letter from Assistant Attorney General Richard W. McLaren to FCC Chairman Dean Burch (April 22, 1969); Letter from Assistant Attorney General Richard W. McLaren to FCC Chairman Dean Burch (July 15, 1970).

Similarly, on petition for review of the Commission's rules in the United States Court of Appeals for the Second Circuit, the Commission was strongly supported by the Justice Department[90/] in urging affirmance of the Commission's order.[91/]

Now again, the Commission's Notice of Inquiry in Docket 21049 makes abundantly clear its intention to focus on competitive factors.

> [T]he Commission must take a careful look at the question of whether the networks may have engaged in conduct which . . . restricts effective competition in the programming market.
>
> . . .
>
> . . . [T]his inquiry concerns the business practices of the networks as they may impact on industry competition. . . .92/

Indeed, the Court has recognized that "[t]he Commission's obligation to regulate for the public interest can, and should offer sufficient assurance that antitrust policy and concerns will be considered in the course of regulating the telecommunications industry."[94/]

90/ Brief for the United States and FCC, Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

91/ In a similar fashion, the FCC has considered competitive concerns often at the urging of the Department, in more recent rulemaking proceedings. See, e.g., Comments of the United States Department of Justice, May 3, 1976, Docket No. 20350 (New Jersey Television Service).

92/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4993, 4996. See also supra pp. 8-15.

93/ United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK, slip op. at 13-14 (C.D. Cal. February 16, 1977).

FCC, as opposed to judicial, action is appropriate in this case also because there are complementary and at time countervailing concerns -- going beyond the scope of the antitrust laws -- which Congress has mandated as objectives in the regulation of the broadcast industry. Thus, the FCC must weigh, among others, four general objectives in carrying out its statutory mandate: to insure (1) locally-oriented programming;[94/] (2) diversity in programming content, concepts and sources;[95/] (3) high-quality, informative, socially desirable programming;[96/] and (4) competitive market structure.[97/]

Because of this broad mandate, the FCC has the ability to strengthen competition in circumstances in which the Department of Justice cannot act. As the Department noted in its joint brief with the FCC urging the Second Circuit to uphold the FCC's

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94/ National Broadcasting Co. v. United States, 319 U.S. 190, 203-04 (1943); National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 537-38 (2d Cir. 1975); Henry v. FCC, 302 F.2d 191, 193 (D.C. Cir. 1962).

95/ United States v. Midwest Video Corp., 406 U.S. 649, 666, 667 (1972); National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 533, 536, 542 (2d Cir. 1975); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 474-76, 479 n.29 (2d Cir. 1971); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 859-60 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

96/ FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940), cited in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 479 (2d Cir. 1971); National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 538-39 (2d Cir. 1975); Citizens Communications Center v. FCC, 463 F.2d 822, 823 (D.C. Cir. 1972).

97/ FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953); General Telephone Co. v. United States, 449 F.2d 846, 857-58 (5th Cir. 1971); Metropolitan Television Co. v. FCC, 289 F.2d 874, 876 (D.C. Cir. 1961).

rules in Docket 12782,

> [i]t is precisely because of the preventive nature of the Commission's powers in the area of competition that its regulation need not derive, for example, from findings of antitrust violation, for the antitrust laws exhaust neither the Congressional policy favoring free competition in radio communications (FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474) nor the Commission's particularization of that policy in rules designed to promote the most effective utilization of broadcast resources and to protect licensee responsibility from unwarranted infringements. The courts have long since held that the proper reach of such policies is far broader than any mere determination as to whether a particular practice violates the antitrust laws. 98/

At times, the FCC has determined that the interest in competition must be subordinated to other elements of the public interest. In Stauffer Publications, Inc.,[99/] for example, the FCC granted a license renewal to a qualified licensee even though the Department contended that, because the licensee also published morning and evening newspapers, control over communications media in the community would become unduly concentrated. Similarly, in decisions governing cable television, the FCC has

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98/ Brief for United States and FCC at 67 n.19, Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971)(citations omitted).

99/ Stauffer Publications, Inc., 59 F.C.C.2d 836 (1976). In rejecting the Department's views, the FCC declared that

> antitrust considerations are but one element of many which enter into the Commission's evaluation of the public interest. "The development of competition, while desirable, is not the single goal for the Commission, as it may be for the Department of Justice." Id. at 848 (citations omitted).

determined that the public interest in unfettered competition in some instances is outweighed by other FCC objectives.[100/]

B. Entry of Proposed Decree Will Enmesh the Court in the Burdensome Task of Administering the Television Industry

Entry of the decree will not end the Court's regulatory involvement with the FCC and this industry. Section IX requires the Court to modify or waive any provision of the decree if a final judgment against ABC or CBS places NBC at a competitive disadvantage and Section XII preserves jurisdiction in the Court "for the purpose of enabling either party . . . to apply . . . at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions. . . ."[101/] It is reasonable to expect that there would be many such applications. Managing and disposing of applications for further orders and directions concerning this decree will be predictably burdensome.

100/ In a recent decision upholding, over the Department's objection many of the restrictions on cable television, the FCC stated:

> That our rules affect competition between the two forms of television is apparent and uncontroverted. The proper question is not whether our rules affect competition, but whether the public interest considerations which underlie the rules outweigh the public interest considerations in support of unfettered competition.

First Report and Order, Docket Nos. 19554 and 18893, 52 F.C.C.2d 1, 45 (1975).

101/ Proposed Consent Judgment, 41 Fed. Reg. 51992, 52009, 52011 (1976).

For the same reasons the Court is required by the APPA to consider the comments of all interested parties before entering a decree, the Court will find it necessary to provide for public comment on petitions to construe, modify or enforce the decree.[102/] In this important and highly visible industry, public comment could often be voluminous. There are many parties interested in the scope and specific content of network regulation: producers (major studios and independents), talent, unions, advertisers and advertising agencies, and television stations (affiliates and independents) not to mention the viewing public.[103/] In Docket 12782, for example, public hearings produced a record of over 11,000 pages of transcript in 70 volumes, with nearly 500 exhibits. The Commission received testimony from approximately 250 witnesses representing nearly 200 organizations.[104/]

Experience with other regulatory decrees confirms this forecast. For example, in litigation under the Paramount

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102/ 15 U.S.C. § 16(f)(Supp. 1976).

103/ See generally National Ass'n of Independent Television Producers and Distribs. v. FCC, 502 F.2d 249, 258 (2d Cir. 1974).

104/ See generally Responsibility for Broadcast Matter, First Interim Report by The Office of Network Study (1960) and Television Network Program Procurement, Second Interim Report by The Office of Network Study pt. 1 (1962) both reprinted in H.R. Rep. No. 281, 88th Cong., 1st Sess. (1963); Television Network Program Procurement, Second Interim Report by The Office of Network Study pt. II (1965).

decrees,[105] the district court which administered the decrees found it had to consider the comments of all interested parties. Although it formally treated the interested parties as amici curiae, the court allowed them to introduce evidence and acted upon the evidence. "As a result each acquisition case in which amici are active has become a private antitrust suit in miniature. . . ."[106]

The FCC's experience with the prime time acess rule provides further indication that there will be frequent petitions for modification or waiver should this decree be entered. The production limitations in the proposed decree impose constraints on the amount of network-produced programming a network may offer during each day part. The FCC's prime time access rule in effect imposes similar constraints on the total amount of programming (independently supplied as well as network produced) that a network offers during prime time. As originally adopted in 1970, the rule basically prohibited television stations in the top 50 markets from carrying more than 3 hours of network

105/ The decrees were entered after the Supreme Court decision in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). United States v. Paramount Pictures, Inc., 1948-49 Trade Cas. ¶ 62,363 (S.D.N.Y. 1948) (the RKO Decree); United States v. Paramount Pictures, Inc., 1948-49 Trade Cas. ¶ 63,009 (S.D.N.Y. 1949) (the Paramount Decree); United States v. Loew's, Inc., 1950-51 Trade Cas. ¶ 64,544 (S.D.N.Y. 1951) (the Twentieth Century-Fox Decree); The Warner Bros. Decree, 1950-51 Trade Cas. ¶ 64,264 (S.D.N.Y. 1951); The Loew's Decree, 1952-53 Trade Cas. ¶ 67,324 (S.D.N.Y. 1952).

106/ Note, An Experiment in Preventive Anti-trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount Decrees, 74 Yale L.J. 1041, 1092 (1965) (hereinafter cited as "Experiment").

programming during prime time.[107] To date, the FCC has issued almost one hundred orders disposing of petitions for waivers or exemptions from the rule. The sheer number and difficulty of these petitions left the FCC, as the Second Circuit observed, with a "sense of uncertainty and frustration."[108] To stem the stream of petitions and to correct other deficiencies in the rule, the Commission modified the prime time access rule on three separate occasions.[109]

Moreover the proposed decree resembles the Paramount decrees in extent and intimacy of judicial regulation of ongoing business practices.[110] The Paramount decrees provoked an avalanche of litigation. Between January 20, 1949, and January 27, 1975, the Paramount docket of the Southern District of New York recorded 2,932 entries.[111] This massive and still continu-

107/ Report and Order, Docket No. 12782, 23 F.C.C.2d 382 (1970).

108/ National Ass'n of Independent Television Producers and Distribs. v. FCC, 516 F.2d 526, 537 (2d Cir. 1975).

109/ Report and Order, Docket No. 19622, 44 F.C.C.2d 1081 (1974); Second Report and Order, Docket No. 19622, 50 F.C.C.2d 829 (1975); Third Report and Order, Docket No. 19622, 33 R.R.2d 1089 (1975). See also Memorandum Opinion and Order and Notice of Proposed Rule Making, Docket No. 21115 (Changes in Prime Time Access Rule Top-50 Market Standard Proposed), February 10, 1977.

110/ See generally, Experiment, supra note 106.

111/ See Equity Docket No. 87-273 (S.D.N.Y.). Even though the various consent decrees are reported under separate captions, the district court has recorded under one docket number every paper filed and order entered in connection with any of the decrees. Many of the petitions presented the court with significant and difficult questions. In 1970 and 1972, for example, RKO, Stanley Warner Theatres, and National General all sought, despite the clear prohibitions of the decrees, to enter motion picture production.

ing litigation has consumed the time and energy of the Department of Justice and the courts as well as the resources of the defendants and the interested parties who participated. Indeed, to insure that its views were fully represented, the Department of Justice assigned one attorney full time to this litigation. He became the Government's "motion picture attorney."[112/] Contemplating this commitment of resources, Donald F. Turner, while Assistant Attorney General in charge of the Antitrust Division, warned that regulatory provisions in consent decrees "should be looked at with great care," and that regulatory decrees are ordinarily not "the proper business of antitrust."[113/]

C. Accommodation of Antitrust Policies to FCC Policies Requires the Court to at Least Await the Outcome of FCC Docket No. 21049 Before Undertaking to Determine Whether the Decree Is in the "Public Interest."

The above discussion makes it clear that this is not the type of case in which the Court is asked to examine the antitrust implications of a discrete transaction or event and render antitrust relief apart from and without regard to the FCC's pervasive regulatory scheme, as was the case in United States v. Radio Corp. of America.[114/] Rather, this Court is asked to approve the imposition of judicially administered ongoing regu-

112/ See Maurice Silverman's Long Tenure Ends, Variety, July 23, 1975, at 5, Col. 2. Mr. Silverman had been assigned to the Paramount decrees since the late 1940's.

113/ An Interview With the Honorable Donald F. Turner, 30 Antitrust L.J. 100, 108 (1966).

114/ 358 U.S. 334 (1959).

latory provisions which in some respects duplicate and in other respects conflict with the FCC's comprehensive scheme of regulations.

In United States v. Radio Corp. of America,[115/] the district court, upon entering the final decree on remand from the Supreme Court, expressly disavowed any intent to substitute its equitable powers for the supervisory and regulatory role of the FCC. The final judgment in RCA explicitly states that the Court will not entertain challenges to, or pass upon the validity of, future conduct; that is, the validity of any acquisition, or undertaking of national spot representation, other than those directly related to particular transactions expressly enjoined by the decree.

> Nothing contained in this Final Judgment shall be construed to require this Court to pass upon any transaction of acquisition or exchange by the defendants or any undertaking by them of national spot representation except to the extent expressly stated in subsections (B) [covering acquisitions in seven specific metropolitan market areas] and (C) of Section IV [limiting national spot representation by NBC other than in six specified markets] and in Section V [ordering divestment of a television and radio station] of this Final Judgment. 116/

By contrast, the essential effect of the proposed decree in this case would be to enmesh the Court deeply in the affairs of the broadcast industry well into the future by requiring the Court (1) to render endless interpretations and judge innumerable applications of the complex and far-reaching provisions of

115/ 1959 Trade Cas. ¶ 69,459 (E.D. Pa. 1959).

116/ Id. at 75,755.

the decree, (2) to consider frequent changes in the decree to render it compatible with ofttimes duplicative rules and regulations of the Federal Communications Commission, and (3) to consider changes aimed at maintaining harmony between the decree and the needs of an industry in which flexibility is vitally important in dealing with constant changes in technology, public tastes and advertiser marketing strategies.

The FCC, aware of the pending antitrust actions and the proposed consent decree in the NBC case, nevertheless observes in its Notice of Inquiry in Docket 21049, that "the Department of Justice has a direct responsibility for the enforcement of the Sherman Act, whereas the Commission's inquiry will focus on public interest questions affecting communications policy pursuant to our responsibilities under the Communications Act of 1934."[117/] The FCC states that it has "neither the power nor the desire to foreclose the Department in its antitrust action."[118/] That however, is no longer the issue, if it ever was. The proposed decree shows there is nothing "antitrust" left in the antitrust action.[119/] The questions now raised by the impending collision of these two regulatory regimes are whether the proposed decree in fact duplicates and conflicts with FCC

117/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4992.

118/ Id.

119/ The proposed decree does not declare an antitrust violation. See supra note 8.

regulation; whether the Court is the proper forum for this type of continuing and changing regulation; and whether the entry of the proposed decree may hinder or prevent the FCC, after completing its new inquiry, from implementing and molding its regulatory scheme for television broadcasting to that which it deems best to serve the public interest.[120/]

To be sure, the FCC has not indicated any formal objection to Court approval of the proposed consent settlement, despite the absence of any factual basis establishing that its provisions are in the public interest.[121/] Nevertheless, it must be observed that even with its intimate knowledge of the industry and expertise in the field, the FCC estimates that it will need a year to complete the investigation recently announced in its Notice of Inquiry in Docket 21049. This time is required by the

120/ The Court has recognized that "maintenance of this action could possibly disrupt the FCC's regulatory efforts. . . ." United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK, slip op. at 10 (C.D. Cal. February 16, 1977). Such disruption is inevitable. Suppose, for example, the FCC, upon ending its inquiry, finds that the public interest requires a change in the rules regarding exclusivity vis-a-vis pay cable. If some other rule has been set in the cement of a court decree, the FCC's efforts will have been meaningless. The FCC will have been effectively ousted from jurisdiction over the area.

121/ The fact that the FCC has indicated in its Notice of Inquiry that its action should not preclude the Department from prosecuting these cases or seeking a settlement is essentially irrelevant. In Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963), the Civil Aeronautics Board took the position that it had no authority over practices challenged in an antitrust suit, and it filed a brief as amicus curiae supporting the Department's antitrust suit. The Supreme Court held, nevertheless, that the conduct was immunized from antitrust scrutiny by the Federal Aviation Act. 371 U.S. at 327-28. Similarly, in United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1975), the Supreme Court dismissed

[continued]

FCC to provide "information necessary to a thorough understanding of television networking"[122/] and thus insure that any regulations it may adopt are in the public interest. The fact that Congress' chosen agency, expert in the field, feels the need to conduct such an investigation before formulating new regulations affecting the subjects of this litigation, should at the very least be sufficient to make the Court pause and refer these questions to that agency for initial resolution. The Court's observation in its decision on defendant's original primary jurisdiction motion is particularly apt and merits repeating in view of this new development.

> . . . [A]ccommodation of antitrust policies to F.C.C. policy in terms of remedies will be a real and substantial problem. Accordingly, the court will give great weight to the F.C.C. rules in the event that it becomes necessary to afford to plaintiff a remedy. 123/

III.

The Primary Administrative Jurisdiction of the FCC Cannot Be Defeated by a Stipulation of the Parties Purporting to Transfer Prospective Regulatory Authority to the Court

Shortly after the commencement of this litigation, NBC (as well as ABC and CBS in their companion cases) moved for an

121/ [Footnote continued from preceding page]

Count I of the complaint notwithstanding the fact that the SEC was not opposed (as it was with respect to the remaining Counts) to the maintenance of a Department challenge to the conduct involved.

122/ Notice of Inquiry in Docket No. 21049, supra note 11, at 4992.

123/ United States v. National Broadcasting Co., 1974 Trade Cas. ¶ 74,885 at 95,992 (C.D. Cal. 1973).

order staying or dismissing the case without prejudice on the grounds that primary jurisdiction resided in the FCC, and that comity between court and agency required deference to the FCC, lest the Court, by its actions, run afoul of the agency's pervasive regulatory scheme.

The Department of Justice resisted the motion, arguing that the FCC had completed its inquiry and that the issues involved were not the subject of ongoing regulatory activity. Except for a minor re-examination of the prime time access rule, it was argued, the FCC had closed its inquiry into network practices. While that proceeding had resulted in the financial interest, syndication and prime time access rules, the Department contended that it was seeking affirmative relief going beyond those rules, and that there was no ongoing FCC proceeding likely to result in such expanded relief.[124/] In short, while conceding that the FCC could regulate all matters covered by its complaint, the Department argued the Commission had done all it was going to do.[125/] As counsel for the Department put it: "So it gets to be a never-never land, we are talking about an ongoing proceeding that doesn't exist."[126/]

The Department also opposed these motions on the ground that the FCC had no power to make a determination or finding of antitrust violation, that the Department was entitled to such an

124/ Transcript of December 4, 1972, at 20, 25-27, 84-85, 95.

125/ Id. at 73, 115.

126/ Id. at 66.

adjudication and that this was something that could be resolved only by the Court. As counsel for the Department stated,

> [s]ince it is the courts, and not the Commission, which must apply the Sherman Act here, it is obvious that defendants' motions must be denied.
>
> Only this court, your Honor, can decide whether the combination and conspiracies in restraint of trade that we charge have violated the Sherman Act. . . .127/

The Court denied the motions, holding that deferral to the agency was not required because FCC rulemaking proceedings "provide for future conduct" and "do not determine the propriety of past conduct" and because "the F.C.C. is not empowered to adjudicate alleged antitrust violations."128/

In view of the Supreme Court's decision in United States v. National Ass'n of Securities Dealers,129/ in November 1975

127/ Id. at 108. See also, id. at 18; Memorandum of the United States in Opposition to Defendants' Motions to Dismiss or Stay These Actions, October 16, 1972, at 9-11, 22.

> The plaintiff seeks an adjudication that the actions of each defendant be declared violative of Sections 1 and 2 of the Sherman Act. The Commission is without power to make a Sherman Act determination.

Id. at 22.

128/ United States v. National Broadcasting Co., 1974 Trade Cas. ¶ 74,885, at 95,992 (C.D. Cal. 1973). The Court also observed: "Nevertheless, assuming antitrust violations are proven, accommodation of antitrust policies to F.C.C. policy in terms of remedies will be a real and substantial problem." Id. This case was dismissed without prejudice on grounds not pertinent to these Comments and was refiled as the instant case United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK (C.D. Cal., filed December 10, 1974).

129/ 422 U.S. 694 (1975).

the three network defendants each separately moved to dismiss the actions on the ground that the Court lacked subject matter jurisdiction.130/ The networks argued that because of the FCC's pervasive regulatory scheme, exclusive jurisdiction resided in the FCC.131/

In opposition, the Department repeated its earlier contention that the FCC was not then actively engaged in or considering any rulemaking related to the principal issues in the antitrust cases.132/ The Department also urged, as it had previously, that only the courts, and not the FCC, had authority to find violations of the antitrust laws.133/

In a Memorandum of Decision and Order filed February 16, 1977, the Court denied defendants' motions, declining "to find that with respect to television programming activities Congress intended to displace the Sherman Act with the regulatory scheme of the Communications Act."134/ However, in so holding the Court

130/ Motions to Dismiss the Complaints With Prejudice for Lack of Subject Matter Jurisdiction, November 19, 1975.

131/ Id.

132/ Plaintiff's Supplemental Reply Memorandum in Opposition to Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction, July 14, 1976, at 8-10.

133/ Memorandum of the United States in Opposition to Defendants' Motions to Dismiss the Complaints With Prejudice for Lack of Subject Matter Jurisdiction, January 13, 1976, at 11-12.

134/ United States v. American Broadcasting Co., Civil Action No. 74-3600-RJK slip op. at 10 (C.D. Cal. February 16, 1977).

noted that the FCC's regulatory scheme "can be considered nothing less than 'pervasive,'" and that "the FCC has been active in exercising its regulatory powers with respect to the subject matter of this suit."[135/] The Court further observed that although the Government "seeks an adjudication" of antitrust violation, "[t]he Commission's obligation to regulate for the public interest can, and should offer sufficient assurance that antitrust policy and concerns will be considered in the course of regulating the telecommunications industry."[136/]

It is now evident that the two reasons put forward by the Department of Justice as grounds for denying the network defendants' primary jurisdiction and exclusive jurisdiction motions have vanished. First, as we have shown the FCC has commenced a proceeding that covers precisely the issues before the Court.[137/] Indeed, this was done over the objections of the Department, which advised the Commission that its comments "should not be construed as suggesting that the inquiry encompass those issues now being litigated in the Federal District Court in California."[138/]

135/ Id. at 9.

136/ Id. at 7, 13-14. Compare United States v. Columbia Broadcasting System, Civ. 3762 (N.D. Ill. 1941) and United States v. Radio Corp. of America, Civ. 3763 (N.D. Ill. 1941) which were dismissed on the Government's motion after it became apparent the FCC had authority to eliminate the challenged practices. See CCH, The Federal Antitrust Laws with Summary of Cases 1890-1951, at 274-275 (1952).

137/ Notice of Inquiry in Docket No. 21049, supra note 11.

138/ Letter, Donald I. Baker, Assistant Attorney General, Antitrust Division, to Honorable Richard E. Wiley, Chairman, Federal Communications Commission (December 3, 1976).

Second, it is apparent that the Department's assertion that only a federal court may adjudicate antitrust violations, and that the FCC is without power to determine that issue,[139/] is nothing more than a makeweight argument. By agreeing to a consent decree, the Department of Justice no longer seeks a judicial determination of antitrust violation.[140/] The proposed consent decree does not find an antitrust violation. Nor does it "determine the propriety of past conduct." It only "provide[s] for future conduct."[141/] Thus, the mere assertion of a right to pursue an antitrust adjudication can no longer be viewed as a serious prosecutorial objective and should not be taken as an insuperable impediment to allowing the FCC to exercise its primary administrative jurisdiction over the subject matter of this litigation.

Although the parties to the proposed judgment have stipulated the Court has jurisdiction to enter the decree, it is well settled that the "jurisdiction of the federal courts -- their power to adjudicate -- is a grant of authority to them by Congress and thus beyond the scope of litigants to confer."[142/] The

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139/ United States v. American Broadcasting Cos., Civil Action No. 74-3600-RJK slip op. at 7 (C.D. Cal. February 16, 1977); United States v. National Broadcasting Co., 1974 Trade Cas. ¶ 74,885 at 95,868 (C.D. Cal. 1973).

140/ See supra note 8.

141/ See supra p. 47 at note 128.

142/ Neirbo Co v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939). See also American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951); People's Bank of Belleville v. Calhoun, 102 U.S. 256, 260-61 (1880); Beach v. KDI Corp., 490 F.2d

parties may not by stipulation oust the FCC from its primary role in this area. Thus, because there are substantial jurisdictional as well as practical conflicts between the proposed decree and the FCC's exercise of authority, the Court should reject the proposed decree.

At the very least, the Court should delay consideration of the proposed decree until the FCC has completed its new inquiry. The Notice of Inquiry in Docket 21049 makes it clear that the FCC believes that further consideration of the matters encompassed by the proposed decree is required. By deferring action on the proposed decree, the Court will afford the FCC, as well as other parties, including the Department, the opportunity to develop the necessary factual record on which to base a reasoned determination as to whether the proposed regulations are in the "public interest."

CONCLUSION

For all the above reasons, ABC urges the Department to withdraw its consent to the proposed decree. The decree disserves the public interest. Its entry would rob the FCC of its congressionally mandated administrative role in the telecommunications industry. If, upon consideration of these comments, the

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142/ [Footnote continued from preceding page]

1312, 1318 (3d Cir. 1974); Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763, 771 (7th Cir. 1974); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 540 (8th Cir. 1970); Barkhorn v. Adlib Assoc., Inc., 345 F.2d 173, 174 (9th Cir. 1965); California Welfare Rights Organization v. Richardson, 348 F. Supp. 491, 493 (N.D. Cal. 1972); Olympic Capital Corp. v. Newman, 276 F. Supp. 646 (C.D. Cal. 1967).

Department nonetheless refuses to withdraw its consent, we request the Court to reject the decree or at least stay consideration of it. Indeed, whatever position the Department takes, ABC will ask the Court to dismiss or stay the action against it on grounds of primary jurisdiction.

Dated: February 25, 1977

Respectfully submitted,

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Response to Comments of American Broadcasting Companies, Inc. ("ABC") on the Proposed NBC Consent Decree

Introduction

In essence, ABC's comments assert that this Court has no guidelines, independent of the Communications Act of 1934 1/, for determining the public interest under the Antitrust Procedures and Penalties Act ("APPA") [15 U.S.C. §16(b)-(h)], and that the proposed Consent Judgment should not be entered because the Federal Communications Commission ("FCC") has either exclusive jurisdiction, primary jurisdiction or both. ABC is in error on both scores. As discussed below, the proper determination of public interest under Section 2(e) of the APPA [15 U.S.C. §16(e)] involves an antitrust standard, rather than one based on the Communications Act, and since the Court has already decided that the FCC has neither primary nor exclusive jurisdiction over this case 2/, this response will address only those ABC comments which relate to (1) the proper standard of judicial review to be applied in considering the proposed Judgment and (2) the substance of the proposed Judgment. 3/

1/ 47 U.S.C. §301 et seq. (1976).

2/ United States v. National Broadcasting Co., Inc., 1974-1 Trade Cas. ¶74,885 (C.D. Cal. 1973); United States v. CBS Inc., 1977 Trade Cas. ¶61,327 (C.D. Cal. 1977).

3/ The jurisdictional issues are treated in the Memorandum of the United States in Opposition to ABC's Motion for Reconsideration of its Motion to Dismiss or Stay, filed March 25, 1977.

I. The Procedure and the Standard of Review Established Under the Antitrust Procedures and Penalties Act.

Pursuant to the APPA, the Court must find that entry of a proposed Judgment is in the public interest. [15 U.S.C. §16(e)]. While such a requirement is not new [United States v. Carter Products, 211 F.Supp. 144, 147-48 (S.D.N.Y. 1962)], the procedure for arriving at such a finding has been altered dramatically under the Act.

The APPA sets forth explicit requirements which must be satisfied by the Department of Justice before the Court can enter a judgment. The Act requires that notice be given to the public, and a Competitive Impact Statement ["CIS"] be filed with the Court and published in the Federal Register [15 U.S.C. §16(b)], that the public have a period of at least 60 days from publication within which to file comments to the proposed Judgment, and that the comments and the Government responses thereto be filed with the Court and published in the Federal Register. [15 U.S.C. §16(d)].

Once this procedure has been completed, the Court has broad discretion in deciding what further to consider. The APPA suggests that the Court consider the matters addressed in the CIS, including the competitive impact of the judgment, the provisions for enforcement or modification, the alternatives considered, and the impact on the public generally [15 U.S.C. §16(e)(1) and (2)].

While there is broad discretion in the Court in deciding what issues to consider and what steps to take to insure a complete ventilation of the consent process, the cases in

which the public interest standard has been considered and the legislative history both strongly suggest that the standard to be met in deciding whether entry is in the public interest, is whether the Judgment is consistent with the allegations of the complaint and the enforcement of the antitrust laws. United States v. Associated Milk Producers, Inc., 394 F.Supp. 29 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, U.S. , 97 S.Ct. 355 (1976); United States v. Gillette Co., 406 F.Supp. 713 (D. Mass. 1975); United States v. Morgan Drive Away, Inc., 1976-1 Trade Cas. §60,949 (D.D.C. 1976); see United States v. Carter Products, Inc., 211 F.Supp. 144, 148 (S.D.N.Y. 1962). This determination must include a recognitiion that antitrust consent settlements are an appropriate and beneficial enforcement tool, that compromise may be involved, and that the Attorney General has broad discretion as to the terms of such settlements.

In United States v. Associated Milk Producers, Inc., supra, the District Court entered a consent decree after finding the Government's resolution of dissolution or divestiture relief to be "well within the discretionary power of the Attorney General under existing law." [394 F.Supp. at 45]. The Eighth Circuit, in affirming, noted:

> It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest. [534 F.2d at 117].

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In United States v. Gillette Co., supra, the Court, in approving a consent decree, explained:

> It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest. Basically I must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass. [406 F.Supp. at 716].

In United States v. Morgan Drive Away, Inc., supra, the Court also imposed a limited standard of review in determining whether entry of the decree was in the public interest. Judge Flannery stated that:

> The result of the bargaining toward settlement should not be measured against what concessions the Government might have succeeded in exacting from the defendants had it bargained somewhat harder, or even against the probable outcome had the case gone to trial. [1976-1 Trade Cas. at p. 69,191]

The Court went on to rule, after considering comments in opposition, that the comments "have not undermined the conclusion of the United States that the proposed Judgment is in the public interest. . . ." [1976-1 Trade Cas. at p. 69,193].

These decisions are consistent with the Congressional intent that consent decrees must remain a viable enforcement option. Such an option would not long remain viable were it necessary for a Court to conduct a de novo determination of the factual issues relevant to the adequacy of the proposed decree. 4/ In fact, the Senate Report advises that, "[o]nly where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so." [S. Rep. No. 298, 93d Cong., 1st Sess. 1, 6 (1973)]. 5/

4/ The Senate Report states:

> The Committee recognizes that the court must have broad discretion to accommodate a balancing of interests. On the one hand the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option. It is not the intent of the Committee to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time consuming means possible . . . .

[S. Rep. No. 298, 93d Cong. 1st Sess. 6 (1973)].

5/ The competitive impact statement required by the APPA is similar to the environmental impact statement required by the National Environmental Policy Act of 1969

Moreover, Congressional intent is clear that the applicable public interest standard is one of judicial construction based on the antitrust laws and antitrust precedents. The original bill included a provision 6/ which stated that the entry of a consent decree must be found to be "in the public interest as defined by law." The phrase "as defined by law" was deleted from the bill according to the House Report,

> . . .as a recognition that the content of the phrase, "public interest," is a product of judicial construction in the context of particular statutes . . . and to provide

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5/ continued

("NEPA"), 42 U.S.C. §4321, [119 Cong. Rec. 24599 (1973)]. NEPA, like the APPA, does not call for a de novo review of governmental action. Upper W. Fork River Watershed Ass'n. v. Corps of Engineers, 414 F.Supp. 908, 915 (N.D. W.Va. 1976). Cf. Camp v. Pitts, 411 U.S. 138 (1973). Further, the Court is neither empowered to substitute its own judgment for that of the Government, Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972), nor required to make findings of ultimate fact or resolve conflicts between the economic theory and data relied on by the Government and that presented by those objecting to the Government's action. Environmental Defense Fund, Inc. v. Froehlke, 368 F.Supp. 231, 240-41 (W.D. Mo. 1973), aff'd sub nom. Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir. 1974).

6/ In Section 2(e).

illumination and consistency in the usage of the phrase, the "public interest" . . . . Preservation of antitrust precedent rather than innovation in the usage of the phrase, "public interest," is, therefore, unambiguous. 7/

Thus, based upon the Act itself, upon the interpretive Court decisions to date, and upon the Congressional intent as expressed in the legislative history, the Court must decide, after taking into consideration all evidence in support of the proposed Judgment and all opposition to it, whether the Government made a clear error in judgment or abused its discretion. If, based upon its review, the Court finds that the entry of the decree would be consistent with the allegations of the Complaint and the enforcement of the antitrust laws, then the Court should enter this Judgment in order to provide expeditious relief by eliminating anti-competitive restraints. See United States v. Carter Products, Inc., 211 F.Supp. at 148.

II. ABC's Comments on Specific Provisions of the Proposed Judgment.

ABC has commented adversely on the production limitation of Section V, the option term limitation of Section VI(E)(i), and the limitation on exclusivity against pay cable television in Section VI(E)(iii)(e) of the proposed Judgment.

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7/ H.R. Rep. No. 1463, 93d Cong., 2d Sess. 1, 11 (1974).

A. The Production Limitation in Section V of the Judgment is an Appropriate Restraint on NBC's Monopoly Power.

As discussed in the CIS, Section V, which would limit for 10 years the entertainment programming which could be produced by NBC for use on its network, should enhance competition in the entertainment program production market, "by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers." [CIS at 8]. ABC's contention that the continued production of entertainment programming by the networks was approved by the FCC [ABC Comments, at 22], is disingenuous. ABC would have the Court believe that the FCC sanctioned in-house program production by the networks. However, the FCC language quoted by ABC for this proposition, in fact reflects the FCC's concern in 1965 with "continuing dominance by network corporations of the television program production and procurement process. . . ." 8/

8/ The Notice of Proposed Rulemaking, Docket 12782, 45 F.C.C. 2146, 2162 (1965), states:

> Strict adherence to the principle of free competition would perhaps suggest the total elimination of network corporations from production and financial and proprietary control of television programming. However, the record of the Program Inquiry and our general knowledge of the situation as it currently exists in network television leads us to the view that the public interest

Moreover, the FCC concluded that network program production should be limited. 9/ This is precisely what Section V of the proposed Judgment would accomplish.

8/ continued

in a nationwide television structure sustained by network program service would not be furthered by eliminating network corporations entirely from the program production and procurement process. We are persuaded that, in order reasonably to insure the quantity and quality of television programming necessary to maintain adequate community service, network corporations should be permitted to engage to a substantial but limited degree in program production, procurement and financing. On the other hand, it is our tentative view that to permit continuing dominance by network corporations of the television program production and procurement processes as disclosed by the record of our Inquiry not only would injure the public interest in a competitive national television structure but also would act as a stricture on the "larger and more effective" use of television channels in the public interest.

9/ The FCC considered prohibiting each network from producing, procuring or financing entertainment programs during 50% of all prime time hours, something quite different than ABC's characterization. Ultimately, in 1970, the FCC prohibited each network from originating any entertainment

Significantly, the FCC has not objected to the proposed production limitation of Section V, but merely sought comment on that provision among others in its recently instituted inquiry into commercial television network practices. In fact, the FCC stated explicitly that its Notice of Inquiry was not intended to preclude the litigation of these network cases or the arrangement of an appropriate settlement. 10/

ABC also argues that the production limitation, when viewed from an economic and competitive standpoint, is unnecessary because the natural forces of the market limit each network's ability to produce and exhibit its own

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9/ continued

program during one hour of prime time, prohibited network acquisition of subsidiary interests or profit shares and prohibited each network from engaging in domestic syndication of television programming. These prohibitions are commonly referred to as the Prime Time Access, Financial Interest and Syndication Rules, 47 C.F.R. §73.658(j) (1975). [Report and Order, Docket No. 12782, 23 F.C.C. 2d 382, 384 (1970), aff'd sub nom. Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 482 (2d Cir. 1971)].

10/ See Notice of Inquiry, Docket No. 21049 (In The Matter of Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest), par. 5, 42 Fed. Reg. 4992 (January 14, 1977); see also the FCC Memorandum to the Court in this litigation, January 11, 1973.

programs. 11/ [ABC Comments at 26]. However, while the FCC rules severely limit the rights and interests which NBC can now acquire in independently produced programs, they permit the retention of certain rights in programs produced by NBC itself. This provides an added incentive for increased internal production by a network, which must be curbed if competition is to be maintained in television programming. Further, a central allegation of the case against NBC was that its "unrestricted ability to produce prime time television entertainment programming, together with its domination and control over access to its combined and affiliated group of television stations and its course of conduct, constitutes an unreasonable restraint of non-network program producers' ability to produce and negotiate for distribution and exhibition of their programming." 12/ The production limitation of Section V, together with the prohibitions of Sections IV(A) and (B) and VI(A), are designed to

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11/ ABC erroneously contends that since the consent decree permits NBC some entertainment production, the issue is no longer whether program production violates the antitrust laws. Lest ABC be misled in its own case, the Government notes that it will seek to have an absolute production ban imposed on ABC, should its case go to trial. The fact that the NBC case is settled for less, is no bar to such a position since the proposed Judgment is not an "adjudication of any issue of fact or law." [Proposed Final Judgment, at p. 1].

12/ Government's Supplemental Statement of Genuine Issues, filed May 21, 1976, Issue I(G).

insure that NBC will not again abuse its market power to gain an unfair competitive advantage over independent program suppliers.

ABC's contention that the production limitation will inhibit NBC's scheduling of programming during periods of short supply [ABC Comments at 23] is based on sheer speculation. There is no shortage of supply in the industry, and no likelihood that one will develop. 13/ Further, insofar as this Judgment holds out the possibility that independent producers might share in the success of highly rated programs while on the network, and would permit such producers to retain rights and interests in programs after network exhibition, it should discourage any future shortage of supply by encouraging entry into the production of television programming.

ABC misstates the law when it argues that the production limitation is unnecessary because "[v]ertical integration through internal expansion is prima facie lawful under the antitrust laws." [ABC Comments at 26]. 14/ While vertical integration is not per se illegal,

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13/ Many more program pilots are produced for each network every year than are ever used. See discussion of Section VI(F), CIS at 12.

14/ None of the cases which ABC cites for this proposition holds that vertical integration is prima facie lawful. While some of them assume that vertical integration may bring a new competitor into the market, that is not the issue in this case, where the contention is that the vertical

> . . . a vertical enterprise, like other aggregations of business units (United States v. Aluminum Co. of America, 148 F.2d 416), will constitute monopoly which though unexercised, violates the Sherman Act, provided a power to exclude competition is coupled with a purpose or intent to do so. [Paramount Pictures, 334 U.S. at 174.]

The three complaints charge that each network excludes competition from program production through the exercise of monopoly power derived, in part, from the ability of each to produce, distribute and exhibit its own product nationwide. However, these actions are not based solely on vertical integration. Central to each charge is abuse of the monopoly power which derives from each network's combination with its owned and operated and affiliated television stations. A combination or conspiracy violates Section 2 of the Sherman Act whenever an appreciable part of interstate commerce is monopolized. 15/

14/ continued

integration is used for the purpose and with the effect of controlling or eliminating competition. United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948); see also United States v. Griffith, 334 U.S. 100, 108 (1948).

15/ United States v. Yellow Cab Co., 332 U.S. 218 (1947); United States v. Lehigh Valley R.R. Co., 254 U.S.

Although the proposed Judgment will, of course, provide no final determination as to the legality of NBC's internal production of entertainment programming for use on its own network of stations, this activity by a network poses serious antitrust questions which are the proper subject of a consent decree. 16/ If ABC believes that the Government will not prevail on the merits, it can proceed to trial in its own case, but its contentions should not interfere with NBC's decision to settle this litigation.

B. The Limitation on the Number of Years of Options which NBC Can Acquire for Program Series is Pro-Competitive.

ABC also objects to Section VI(E)(i), which limits to four the number of yearly options NBC may initially acquire

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15/ continued

255 (1920). See Memorandum of the United States in Opposition to Defendants' Motions for Summary Judgment on the Sherman Act Claims, at 12-27 (filed January 19, 1976).

16/ In that connection, ABC also seeks [Comments at 27-28] to twist the court's decision on a motion for a preliminary injunction in Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc., 1974 Trade Cas. ¶74,912 at 96,095 (S.D.N.Y. 1974), aff'd, 501 F.2d 894 (2d Cir. 1974), into a finding that ABC's internal production is permissible under the antitrust laws. Actually the Court recognized "that there are 'substantial, serious, difficult and doubtful' questions. . . ." concerning ABC's production and exhibition of feature films on its own network. [501 F.2d at 897].

for a program series, and permits an additional fifth year option only if the parties renegotiate the agreement. This provision would restrict NBC's present ability to initially obtain exclusive rights to programs for as long as 5-7 years and to renegotiate for even longer periods of time [CIS at 11]. This limitation seeks to increase competition for program series among the networks and with television stations at an earlier point in the life of a successful program. By permitting producers to share earlier in their programs' successes, this provision should encourage increased program production and attract new entrants into the field.

ABC contends that the FCC, by assuming that the networks would obtain longer options on program series, has sanctioned such options. [ABC Comments, at 28-29]. However, the FCC has never addressed itself to the contractual options granted to networks by producers, and even if it had, this could not immunize network conduct which violated the antitrust laws. More significantly, the FCC has not indicated that this or any other provision of the proposed Judgment is, in any fashion, inconsistent with its position. To the contrary, it states that its current Notice of Inquiry is in no way intended to interfere with the entry of this Judgment. 17/

C. The Provision on Pay Cable Exclusivity Has Been Withdrawn.

ABC also commented adversely about Section VI(E)(iii)(e), which would have limited NBC's right to acquire exclusivity

17/ Notice of Inquiry, at Paragraph 5. See also the FCC Memorandum to the Court in this litigation, January 11, 1973.

for theatrical feature films against their use on pay cable television. The relief proposed in this provision was simply intended to establish an upper limit on terms obtained by NBC, at a level lower than the current practice, rather than a determination of what period of network exclusivity would be reasonable under the Sherman Act. Because of strong adverse comment by numerous public interest and Congressional entities, and by pay cable television operators, asserting that the provision would establish a standard which would adversely affect the pay cable industry, the Government became convinced that it would not provide meaningful relief. And, since no agreement on a more limited period for this type of exclusivity could be reached with NBC, the Government seriously considered withdrawing its consent to entry of the Judgment. However, in a recent decision the District of Columbia Court of Appeals, citing "antitrust questions," ordered the FCC to consider and resolve this problem within 180 days. 18/ Consequently, it was decided that outright removal of this provision would be appropriate and desirable as well, because its deletion would permit entry of the remainder of

18/ Home Box Office, Inc. v. FCC, No. 75-1280 (D.C. Cir. March 25, 1977). In addition, since the Court vacated the FCC rules which limited pay cable's access to feature films during the third through the tenth year after their theatrical release, all of ABC's comments on this provision reflect a situation which is no longer in existence and are, therefore, obsolete.

the Judgment. The parties have stipulated that removal of this provision does not preclude any possible future action in this area against NBC, and does not in any way prejudice any person. 19/ It is our belief that this deletion from the NBC Judgment does not eliminate the issue from the pending litigation against CBS and ABC.

19/ The Stipulation, in pertinent part, provides:

> . . . the original inclusion and subsequent deletion of Section VI(E)(iii)(e) from the proposed Final Judgment, shall not estop plaintiff or defendant, or any person, in this or any other action or proceeding, from asserting any issue of fact or law as to the subject matter of Section VI(E)(iii)(e) or as to the use of contractual rights to the exclusive use of talent or of literary properties for television exhibition, nor shall they constitute any evidence or admission as to any such issue.

Bernard M. Hollander

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Attorney for the United States

Form OBD-183
12-8-76 DOJ

3706 Mr. Hollander
Kaplan 3714

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January 19, 1977

Bernard M. Hollander, Esq.
Chief
Judgment and Judgment
Enforcement Section
Antitrust Division
Department of Justice
Room 3706
Washington, D.C. 20530

Dear Mr. Hollander:

These comments are submitted by the Institute for Public Interest Representation ("Institute") pursuant to the Antitrust Procedures and Penalties Act (hereinafter "APPA") (15 U.S.C. § 16(b)(1974)) relating to the proposed consent judgment entered against National Broadcasting Company, Inc. (hereinafter "NBC") in United States v. National Broadcasting Company, Inc. (Civil Action No. 74-3601-RJK) (C.D. Cal.).

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ANTITRUST

The Interest Of The Institute

The Institute is a public interest law firm operated by Georgetown University Law Center. The work of the Institute is centered around activities of federal agencies. Through written reports, participation in rulemaking proceedings and litigation undertaken when administrative remedies have been exhausted, the Institute strives to assist agencies of our government in carrying out their responsibilities to promote and protect the various public policies entrusted to them. The Institute, as a public interest law firm, is especially interested in the APPA. That Act embodies a Congressional intent to encourage participation by the public in the antitrust consent decree process by affording an opportunity to interested persons to comment on such decrees. In order to facilitate public comment, the Act requires the Antitrust Division to publish a competitive impact statement (hereinafter sometimes "CIS"). The Act requires each such statement to explain the nature and purpose of the case proposed to be settled and the estimated effect on competition of the proposed decree. The APPA also requires in subsection (b) that written comments from the public on proposed antitrust decrees

be forwarded by the Division to the district court which is considering the proposed decree.

In view of the Congressional interest in permitting informed public comment, the Institute, as a public interest law firm specializing in agency procedures, endeavors to insure that competitive impact statements filed by the Antitrust Division adhere to the requirements of the APPA. We believe we serve an important public interest in seeking to have the Division adhere to the Act's requirements in the NBC case and in asking the District Judge presiding in the case to consider our comments in the light of the purposes of the APPA.

Summary

Our comments undertake to demonstrate that the competitive impact statement in the NBC case fails to meet the requirements of the APPA in three important and distinct respects. First, it contains, we submit, a misstatement as to the relief provided. Second, it fails to explain adequately why the unusual provisions set out in sections VII and IX of the proposed decree were adopted. We submit that these provisions constitute an "unusual circumstance" within the

meaning of subsection (b)(3) of the APPA and therefore require an "explanation," which the Justice Department has failed to provide. Third, the competitive impact statement does not comport with the requirements of subsection (b)(3) insofar as it fails to explain the "anticipated effects on competition" of the relief that actually will be forthcoming in the event that similar injunctive relief is not obtained in final decrees entered against CBS and ABC. We seek to show below that the relief that the government will in fact obtain is largely dependent on the outcome of two other pending lawsuits; that the Division has entirely omitted in its discussion of the competitive impact statement the effects the decree will have on competition should the other lawsuits be lost or yield a substantially less restrictive final decree; and that the failure to submit such an alternative analysis violates the APPA and makes unnecessarily difficult public critical scrutiny of the proposed decree.

In our comments we do not consider whether the relief sought in the complaint is in the public interest. Nor do we consider the difficult question whether elimination of the anti-competitive evils alleged in the complaint would better be achieved by resort to the administrative remedies

provided at the Federal Communications Commission. Cf. CIS(2) (FCC rules govern certain relationships between major networks and independent producers). Nor do we consider whether or not it is wise for a final judgment in a Sherman Act case to be filled with injunctions of a "regulatory nature" as is the case here. See CIS(3), Section VI. The competitive impact statement filed by the Antitrust Division offers an inadequate basis for public comment on these questions.

Specific Comments

1. Subsection (b)(3) of the APPA (15 U.S.C. § 16(b)(3)(1974)) provides that " . . . the United States shall file with the district court . . . a competitive impact statement which shall recite --

* * *

> (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief."

The competitive impact statement in section (1) describes the relief sought by the Government in the complaint

and then states that the consent decree "provides relief similar and substantially equivalent to that requested in the complaint." See CIS(1); see also CIS(6). That statement is, we submit, not correct. */ The complaint (prayer 5) sought to have NBC enjoined from producing any entertainment programs for broadcast over any commercial television network . Instead of a flat prohibition, the decree limits "the amount of television entertainment programming which may be produced by NBC." CIS(3), Section V.

2. Many of the more important provisions of the consent decree do not take effect unless and until similar injunctive relief is obtained in separate civil actions against CBS and ABC. See CIS(3), Section VII. Moreover, Section IX of the decree provides that if the Division loses either the case against CBS or that against ABC, the decree against NBC may be nullified, on motion of NBC, to the extent "necessary to prevent [NBC] from being placed at a competitive disadvantage." With respect to Section IX,

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*/ We wish to emphasize that we have no evidence indicating, nor do we believe, that the Antitrust Division or its counsel acted in bad faith in this matter.

the competitive impact statement contains this cryptic sentence:

> While this type of provision is unusual in an antitrust judgment, it is warranted by the unique nature of this industry, and the pendency of the companion actions.

CIS(3), Section IX.

This conclusory and unilluminating statement hardly qualifies as an "explanation of any unusual circumstances giving rise to such proposal" as required by subsection (b)(3) of the APPA. Why does the Antitrust Division propose to enter into a consent decree containing such "unusual" provisions? What are the relevant "unique" aspects of "this industry?" Why is this provision "warranted" in view "of the pendency of the companion actions?" The competitive impact statement neither asks nor answers any of these questions.

We submit that the Antitrust Division has an obligation under the APPA to disclose and explain, fully and fairly, all of the circumstances that gave rise to these unusual provisions. To be sure the APPA by its terms requires an explanation of "unusual circumstances," not "unusual" provisions. Thus it might be argued that usual "circumstances" could give rise to "unusual" provisions, and that in such a

situation no explanation is required by the APPA. But this would ignore one of the principal objectives of the APPA: to inform the public and the Court of any non-routine situation giving rise to any provision in any proposed antitrust consent decree. Interested persons would thereby be placed in a position to comment intelligently on such a decree.

In the words of Congresswoman Jordan on the floor of the House while the APPA was under consideration: The "simple purpose [of the APPA is] to ventilate the consent decree process . . . [The APPA] would pierce the secrecy with a requirement that the Justice Department file a competitive impact statement . . . The public will [then] have 60 days to comment . . ." 120 Cong. Rec. 36343-44 (1974).

If the Antitrust Division is not required to reveal in its competitive impact statement the reasons for adopting unusual provisions in consent decrees, the public is left to the mercy of the Division. It must trust the Division to decide what circumstances are unusual. It was the revelations surrounding the ITT case that provided a major impetus for adoption of the APPA. The drafters of that Act

intended to require the Division to reveal anything about any proposed antitrust consent decree that is "unusual." Thus a sensible construction of the Act, and one that comports with its broad remedial purposes, is to read it as establishing a requirement that the Division explain any unusual provisions in order that the Court and the public may be made aware of the circumstances that led the Division to propose them.

In brief, once a provision in a consent decree is admitted to be "unusual" as the Division does in the CIS in the NBC case, it can be inferred that "unusual circumstances" produced it. At the very least, it is incumbent upon the Division to explain the circumstances that lead to unusual provisions in order that the public and the courts may assess for themselves whether the circumstances warranted such unusual provisions. We ask, and we submit the APPA requires, that the Division describe and justify those circumstances in its CIS, whatever they were.

3. The relief the Division has obtained in the proposed NBC decree is almost entirely dependent on the outcome of the pending cases against CBS and ABC. This is demonstrated by close analysis of Sections VII and IX of the

decree itself. Section VII provides that six specific sections or subsections of the decree "shall not take effect until similar injunctive relief is obtained . . . against CBS [and] ABC." */ Section IX provides that NBC may have the remainder of the injunctive relief in the decree nullified if the Government loses either its case against ABC or CBS, or if the Government obtains against CBS or ABC "injunctions different . . than those required by this Final Judgment . . . NBC . . . shall be granted a modification of . . . any terms set forth herein as may be necessary to prevent NBC from being placed at a competitive disadvantage . . ."

Subsection (3) of the competitive impact statement is captioned "The proposed consent judgment and its anticipated effect on competition." Nowhere in this section of the CIS is there discussed the "anticipated effect on competition" if similar relief is not obtained in the cases against CBS and ABC.

We submit that the CIS should have discussed separately (a) the likelihood that the Government will obtain relief against both CBS and ABC of the types that will take effect against NBC upon entry of the proposed decree; (b) the

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*/ Sections V, VI(c), VI(E)(i), VI(F), VI(G) and VI(H).

likelihood that it will obtain relief against both CBS and ABC of the types contained in those parts of the proposed decree against NBC which do not go into effect until similar relief is obtained against both CBS and ABC; and (c) the anticipated effect on competition of that part of the decree against NBC which goes into effect immediately but would remain in effect only until the cases against CBS and/or ABC are finally concluded by entry of a decree containing no relief or different relief than that obtained in the proposed decree against NBC.

If the Division is unwilling or unable to make categorical predictions as to the outcome of the cases against CBS and NBC, then the competitive impact statement, we submit, should have evaluated the relief against NBC in the alternative. In other words, the competitive impact of the NBC decree should have been evaluated, first, on the assumption that similar relief will be obtained against both CBS and ABC, and second, on the assumption that such relief will not be obtained against both. Only if this is done can interested members of the public have a basis on which to judge whether the decree will have any significant "effects on competition" (APPA, subsection (b)(3)). The

failure to discuss these questions would be all the more serious if, as we are informed, both CBS and ABC separately advised the Antitrust Division before it filed its CIS that each would not consent to relief similar to that obtained against NBC.

Conclusion

We recognize that considerations of trial strategy may have made the Division hesitate to reveal the circumstances that caused it to enter into this unusual decree while the companion cases against CBS and ABC are pending. But the APPA, by mandating full disclosure of all unusual circumstances, requires the Division to assume the risk, if risk there be, of disclosure.

Our objection to the competitive impact statement filed in this case is not that the Division has been mistaken or misguided in its decision to enter into the decree against NBC. Rather, it is our position that the Division has failed to comply with the dictates of the APPA. That Act, we repeat, was intended -- quite literally -- to compel the Antitrust Division to disclose and justify any unusual circumstances surrounding acceptance of any unusual antitrust consent decree. The purpose of Congress in adopting this novel legislation was to open up the circumstances surrounding adoption of consent decrees to public scrutiny so that

interested members of the public could intelligently comment on them. We submit that the Division has not adhered to the legislative command in the APPA in its competitive impact statement filed in this case. Accordingly informed comment by the public on the question whether the proposed decree against NBC is in the public interest has been rendered very difficult, if not impossible.

We urge the Division either to withdraw its consent to the proposed decree, or to file an amended competitive impact statement correcting its deficiencies. If any amended CIS is filed, interested members of the public should be given sixty days after its publication to comment on the proposed NBC decree.

If the Antitrust Division should consider these comments to be substantially without merit, we respectfully urge the District Court */ to consider our comments and, if they are found to be sound, to direct the Antitrust

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*/ Subsection 2(b) of the APPA requires the Division to file these comments and its response with the Court. See supra, pp. 2-3.

Division to file an amended competitive impact statement, correcting the deficiencies herein noted.

Respectfully submitted,

Victor H. Kramer
Director

Thomas Krattenmaker
Consultant

Response to the Institute For Public Interest Representation, Georgetown University Law Center

The Institute contends that the Competitive Impact Statement ("CIS") filed with respect to this proposed Judgment does not satisfy the requirements of the Antitrust Procedures and Penalties Act ("APPA") (15 U.S.C. §16(b)-(h) (1974)), because it is inaccurate in characterizing the relief obtained; because it does not explain the unusual circumstances leading to the provisions in Sections VII and IX; and because it does not explain the effects on competition, if similar relief is not obtained from CBS and ABC. While the Department shares the Institute's desire to improve and upgrade the process for entry of consent Judgments and the quality of Competitive Impact Statements, we disagree with its contentions here.

The CIS correctly states that the proposed Judgment provides relief which is similar and substantially equivalent to that requested in the complaint [CIS at 2-3]. The Institute points out that the proposed limitation on NBC's production of television entertainment programs is not substantially equivalent to the complete ban originally sought. The CIS, however, carefully and fully explains the differences between the Judgment provisions and the relief prayed for in the complaint, stating, with respect to the production limitation:

> A provision permanently prohibiting NBC from producing any television entertainment program for network exhibition was sought in the complaint. The compromise reached in Section V of the judgment would limit for ten years NBC's production of television entertainment for its network use, not only during prime time, but also during daytime or fringe hours. . . . While the Government at trial would have sought a complete prohibition of television entertainment program production by NBC, this judgment provides substantial relief which will prevent NBC from foreclosing significant amounts of independently produced programming from its television network. [CIS at 16-17].

While some may differ subjectively as to whether this is substantial and equivalent relief with respect to internal production, the CIS fully explains the relief sought and that obtained. In any event, the "similar and substantially equivalent" language of the CIS refers not to the relief provided by any section standing alone, but to the relief obtained in the Judgment as a whole. That relief, when viewed en toto, is substantially equivalent to that requested in the complaint.

These actions were not brought to eliminate the three networks, but to limit their use of market power and encourage as much competition as possible within this three program buyer market structure. By opening up the stripping and syndication markets, by limiting network production, and by reducing program renewal options, the Judgment seeks to encourage competition in television entertainment program production, both among networks and between networks and other broadcasters. Moreover,

the injunctions in Sections IV and VI(A)-(C) should prevent NBC from abusing its market power when acquiring network exhibition rights.

Further, the Government does not believe that the CIS falls short in its discussion of the provisions of Sections VII or IX, or in its discussion of the anticipated effects on competition, if similar injunctive relief is not obtained from ABC or CBS. As explained, this is an unusual industry [CIS at 14], in that the three networks are the only purchasers of commercial television programming for simultaneous nationwide broadcasting. Each network as a purchaser has enormous market power, not subject to meaningful competition from the other two networks or from non-network television stations. This Judgment seeks to limit NBC's use of its power in purchasing television entertainment programs. If, however, the Court were to decide after a trial not to prohibit or limit the use of similar market practices by CBS or ABC, then it might be appropriate for NBC to seek relief from any portions of this Judgment which place it at a competitive disadvantage vis-a-vis CBS and ABC. For example, while Section VI(E)(ii) of the Judgment would limit to three years the period during which a prime time program series could be exclusive to NBC (as against syndication in other day parts), the present network practice is to require such exclusivity for the length of the initial 5-7 year contract, plus extensions which may run substantially longer. Should the Court after trial fail to award similar relief against CBS and ABC, then NBC should be free to seek modification of this provision,

upon a showing that it had been placed at a competitive disadvantage.

The same analysis is valid with respect to those other portions of the Judgment, which pursuant to Section VII will not become effective until similar injunctive relief is obtained against CBS and ABC. For example, Section V of the Judgment would enjoin NBC from producing for its own use more than 2-1/2 hours of prime time entertainment programming per week, plus 2 additional special programs every six months. Were the Court to rule after trial that CBS's or ABC's unlimited power to produce entertainment programming should not be curtailed, then NBC, because of the peculiar structure of the market, should not be subject to such a prohibition. 1/

The provisions of the decree which go into effect immediately, or within 30 days after entry of the Judgment, would have the procompetitive effect ascribed to them in the CIS. Section IV tracks the Federal Communications Commission Financial Interest and Syndication Rules (47 C.F.R. §73.658(j)), which are already in effect, and have increased competition for syndication rights and allowed program producers to retain more ownership rights in their programs.

1/ See CIS at 5-6. It should be noted, however, that the Government has not conceded that each provision which does not become effective until similar relief is obtained against CBS and ABC would place NBC at a competitive disadvantage if it were applicable to NBC alone.

Section VI(A) is a general injunction against abuse by NBC of its market power through acquiring more control over programs and producers than is necessary to permit network exhibition. Section VI(B) prevents NBC from conditioning access to its chain of stations on the producer's agreement to use NBC's production facilities in producing his program. This provision seeks to assure that a producer's decision on facility use will be made on a competitive basis and not to increase the chance that NBC would accept his program. Sections VI(E)(ii) and (iii) would limit the exclusivity rights which may be obtained by NBC in connection with its licensing of a program series or a motion picture, and should increase the amount of such programming available in the syndication and other media markets. All of these provisions would become effective upon entry of the Judgment, even if no injunctive relief were obtained against CBS or ABC.

In sum, we believe that the CIS satisfies the requirements of the APPA in every respect, and that entry of the Judgment against NBC would be in the public interest.

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